Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A landlord in Santa Monica, California, filed an inverse condemnation action alleging that the application of that city's rent control law effected a regulatory taking of his property by failing to substantially advance legitimate state interests. The California Supreme Court ruled that an inverse condemnation claim could not be stated by allegations that the application of Santa Monica's rent control law had reduced the city's stock of affordable housing and imposed especially harsh impacts on the poor, the elderly, and young families, whom the law was expressly designed to protect. This raises the following questions for review by this Court:

1. Should the ends-means nexus test of *Nollan v. California Coastal Commission* be used to determine whether a rent control law effects a regulatory taking as applied to specific real property?

2. Is a claim for an as-applied regulatory taking properly set forth by factual allegations which, if proven at trial, would show that the application of a rent control ordinance has "no relationship at all" to its admittedly legitimate police power objectives?

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Petitioner Santa Monica Beach, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court, entered in the above-entitled proceeding on January 4, 1999.

OPINIONS BELOW

The decision of the Supreme Court of the State of California is reported as *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 81 Cal. Rptr. 2d 93 (1999), and is reproduced as Appendix (App.) A to this petition. The decision of the California Court of Appeal, Second Appellate District, was previously reported as *Santa Monica Beach, Ltd. v. Superior Court*, 42 Cal. App. 4th 1228 (1996), and is reproduced as Appendix B. The Order Sustaining Defendant's Demurrer entered by the Los Angeles County Superior Court in *Santa Monica Beach, Ltd. v. Santa Monica Rent Control Board* is unreported and is reproduced as Appendix C. Page references are to the versions in the appendices.

JURISDICTION

The opinion of the California Supreme Court that is the subject of this petition was filed and entered on January 4, 1999. App. A. The California Supreme Court considered and decided the question of whether allegations that Santa Monica's rent control ordinance failed to substantially advance legitimate state interests as applied to Petitioner supported a claim for an uncompensated regulatory taking of Petitioner's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

Santa Monica City Charter Article XVIII, Section 1800, *et seq.* (the Rent Control Law), imposes rent control on privately owned residential rental property in Santa Monica, purportedly to protect and increase the city's supply of affordable housing and to promote the welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The full text of the Rent Control Law is reproduced at Appendix F.

STATEMENT OF THE CASE

A. Santa Monica's Rent Control Law

In April, 1979, the City of Santa Monica adopted City Charter Article XVIII, Section 1800, *et seq.* Among other things, the Rent Control Law requires that owners of residential rental property register each rental unit and pay annual registration fees to the Rent Control Board, establishes maximum allowable rents, and prohibits evictions except for specified reasons. The Rent Control Law's statement of purpose is set forth as follows:

> A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. *These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens.* The purpose of this

> article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return.
>
> Through this Article, the city exercises its police power in order to address the serious housing problem recognized in the original enactment of this Rent Control Law in 1979 and still existing in 1984. The 1984 Amendment to the Rent Control Law is . . . intended to enable the Board to provide relief to persons facing particular hardship and to protect and increase the supply of affordable housing in the city. Termination or erosion of the protections of this Article would have serious disruptive consequences for persons in need of protection and the supply of affordable housing in the city.

App. F-1-2 (emphasis added).

The facial validity of the Rent Ordinance is not at issue in this litigation, nor does Petitioner question that providing assistance to the poor, minorities, students, young families, and senior citizens is a legitimate interest of government.

B. The Rent Control Law Is Applied to Santa Monica Beach's Property

Petitioner Santa Monica Beach, Ltd. (SMB), owns a 12-unit apartment building in the City of Santa Monica that is subject to the Rent Control Law. In 1992 and again in 1993, SMB filed petitions with the Rent Board seeking rent adjustments sufficient to assure it a fair return on certain investments in capital improvements. These petitions were denied in whole or in part by the Rent Board's hearing examiner, whose determinations were affirmed by the Rent Board on appeal.

C. SMB Files Suit for a Regulatory Taking, Alleging That the Application of the Rent Control Law to its Property Fails to Substantially Advance Legitimate State Interests

SMB filed this lawsuit in March, 1994, alleging that the Rent Board's actions comprised a regulatory taking by failing to substantially advance legitimate state interests. That same year, California adopted unique procedural requirements for pursuing regulatory taking claims. *See Hensler v. City of Glendale*, 8 Cal. 4th 1, 9-21 (1994). In compliance with these requirements, in 1995 SMB joined a petition for administrative mandamus (seeking invalidation of the Rent Board's decision) with its complaint for inverse condemnation (seeking just compensation under the Fifth Amendment).

The core of SMB's complaint consisted of allegations that, as a factual matter, the Rent Board's application of the Rent Control Law had failed to advance--and in fact had substantially *impeded*--the legitimate policy objectives of the law. Specifically, SMB alleged that between 1980 and 1990, during which time the City's rent control law was continuously in effect:

- the City's stock of rental housing units declined by nearly 5% and the City experienced a loss of 775 low-income rental units notwithstanding that, during the same period, the rental housing supply and the number of low-income rental units *increased* in all comparable Southern California cities without rent control (App. E-3);
- during this time Santa Monica also lost 285 "very low-income" rental units, evidencing the largest exodus of economically disadvantaged renters from any comparable Southern California city (*id.*);
- under the City's administration of the Rent Control Law, rental housing in Santa Monica had become "increasingly unavailable" to young families, with the number of

family households with children declining by 6% during a period when no comparable non-rent-controlled Southern California city lost young family households (App. E-4);

- the impact of the Rent Control Law was especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under 18 in Santa Monica fell by more than 27% under rent control, despite an increase in such households in Los Angeles County as a whole (*id.*);[1]

- Santa Monica suffered a decline in its elderly population under rent control. This decrease was especially remarkable because the elderly population of Los Angeles County rose by more than 15% over the same decade. The elderly population increased over this period in every comparable southern California city without rent control. *Id.*

SMB asserted, on the basis of these factual claims, that the Rent Board's denial of its application for a fair rate of return on its capital investment bore no close nexus to the alleviation of any public harm that might result from the unregulated use and enjoyment of its property. Not only did the City's application of the rent ordinance do nothing to mitigate the effects of "a growing shortage of housing units" by making affordable housing more available to "the poor, minorities, students, young families and senior citizens," it actually made conditions worse. Thus, SMB claimed, the application of the Rent Control Law to its property does not meet the "substantial advancement" test articulated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-37 (1987).

For all of the above reasons, SMB argued that the Rent Board's application of the Rent Control Law to its property

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[1] Los Angeles County includes the City of Santa Monica.

effected an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

D. The Trial Court Dismisses the Suit on the Grounds That a Regulatory Taking Challenge to the Application of a Rent Control Law Is Subject Only to "Rational Basis" Review

The Rent Board demurred to SMB's inverse condemnation cause of action, contending that the Board's application of the Rent Control Law is not required to substantially advance the law's objectives and that *Nollan's* heightened standard of review does not apply to a Takings Clause challenge to the application of rent regulations. Respondent Los Angeles Superior Court sustained the Rent Board's demurrer to SMB's inverse condemnation claim and dismissed this cause of action on the sole ground that the "rational basis" standard of review is supposedly applicable to this claim. An order sustaining the demurrer to the inverse condemnation cause of action, without leave to amend, was entered on October 20, 1995. App C-1.[2]

E. The California Court of Appeal Reverses, Holding That SMB Is Entitled to Present Evidence Showing That the Application of the Law Bears "No Relationship at All" to Its Stated Purpose

SMB filed a petition for a writ of mandate with the California Court of Appeal, seeking reversal of the order sustaining the Rent Board's demurrer. SMB's petition raised the federal constitutional issue of whether *Nollan's* "substantial advancement" analysis is applicable to a regulatory taking challenge to the application of a rent control law.

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[2] SMB's procedurally required administrative mandamus petition remains unheard. As was recognized by the court below, this petition has no bearing on the trial court's final determination of SMB's federal claim for just compensation under the Fifth Amendment. App. A-10-11 n.2.

SMB's petition was granted and the appellate panel unanimously reversed Respondent Superior Court. The court of appeal held that whether continued application of the ordinance to SMB's property constituted a compensable taking was a fact-intensive inquiry that could not be resolved on demurrer. App. B-2. The court of appeal also recognized that *Nollan* expressly rejected the application of the rational basis test in regulatory taking cases, and affirmed the applicability of *Nollan's* "substantial advancement" standard to the case at bar. App. B-13-15. Finally, the appellate panel noted that if SMB can prove its allegations at trial, then the City's application of the Rent Control Law

> ***has no relationship (nexus) at all to its stated purpose***. Deference to legislative authority cannot salvage a regulation that defeats rather than accomplishes its stated purpose.

App. B-16 (emphasis added).

F. A Sharply Divided California Supreme Court Reverses, Holding That Rental Property Owners Can Be Singled out to Bear Special Burdens in the Name of Providing Public Benefits to the Poor, Minorities, and Other Groups, Even If the Program in Question (Rent Control) Fails to Advance Those Objectives

The California Supreme Court granted the Rent Board's petition for review and reversed the court of appeal, reinstating the order of the Respondent Superior Court. A narrow 4-3 majority held that *Nollan's* "substantial advancement" test and heightened standard of review are not available to property owners who allege their property has been taken by the application of a rent control law. Instead, the application of such laws to a particular property will be upheld against taking claims in California so long as reviewing courts can imagine any rational basis for the adoption of the law. App. A-14-16; A-21-22.

Three justices filed separate strong dissents from this holding, while one of the majority justices filed a concurrence asking for this Court to provide guidance on this important question.

Persistently mischaracterizing SMB's inverse condemnation claim as an attempt to "invalidate" or "repeal" the Rent Control Law, the majority below held that *Nollan's* substantial advancement standard is inapplicable to as-applied regulatory taking challenges to rent regulations. Instead, such challenges may only be maintained if the landowner claims that the government action "constitutes an arbitrary regulation of property rights." App. A-14. The court then engaged in a protracted exercise of *imagining* possible legitimate objectives for the Rent Control Law, demonstrating to its own satisfaction that the enactment of the law in 1979 was not arbitrary. App. A-20-21. Finally, the court suggested that the Rent Control Law should be presumed to substantially advance legitimate state interests so long as it benefits any tenant, regardless of the rationale for burdening property owners, and regardless of any social harms caused by the application of the law. App. A-22. On the basis of this analysis, the court below reversed the appellate court's opinion and dismissed SMB's complaint.

1. Justice Kennard's Concurrence Seeks Guidance from this Court

Although joining with the majority in ruling that heightened ends-means scrutiny should not be applied in the context of rent control, Justice Kennard recognized the unsettled state of this vital federal constitutional issue:

> [I]n the past 20 years the United States Supreme Court has adopted the rule that government regulation of property is a taking if it fails to substantially advance a legitimate state interest. . . . Outside the *Nollan/Dolan* context, the United States Supreme Court has not yet had occasion to define how closely

> ends and means must be related for a government action to avoid being a taking.

App. A-29, A-31 (Kennard, J., concurring). Justice Kennard then took the unusual step of directly appealing to this Court to review a decision in which she concurred!

> Outside the *Nollan/Dolan* context, should a means-end test be used to determine whether a taking has occurred, or instead should means-end testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of the law, ***I respectfully suggest that it do so when the opportunity next arises.***

App. A-38 (Kennard, J., concurring) (emphasis added).

2. Justice Baxter's Dissent Highlights the Majority's Failure to Extend Adequate Protection to Rights Guaranteed Under the Federal Constitution

In a thoughtful and comprehensive dissent, Justice Baxter dissected the majority opinion and demonstrated its fundamental conflict with this Court's protections of individual rights under the Takings Clause. The constitutional safeguard of close judicial scrutiny, he noted, is *especially* vital in evaluating the application of rent regulations:

> The analytical focus in assessing whether rent control constitutes a taking for which the takings clause mandates just compensation ***must be directed to the means by which rent control accomplishes its purpose.*** Rent control differs from and cannot be equated to other forms of price control because it encroaches on property rights in ways that price control does not. The Santa Monica rent control ordinance takes from the property owner the right to charge market rent for the owner's property and by so

> doing compels the owner to subsidize the tenant. Price control creates no comparable direct transfer of a property interest to a third person. The ordinance in question depresses the value of the rent-controlled property. Unlike property used to manufacture price-controlled items, rental housing cannot easily be used for other purposes and the Santa Monica ordinance severely limits the ability of the owner to go out of the rental housing business. Finally, the ordinance transfers to the tenant the right to occupy the property for an indefinite period. Again, none of this is true of other forms of price control. Thus we cannot assume that decisions upholding other forms of price control are authority for rejecting a takings clause challenge to a rent control ordinance.

App. A-56-57 (Baxter, J., dissenting) (emphasis added).

Reviewing this Court's decisions in the fields of rent control and regulatory takings, Justice Baxter noted:

> A claim based on the theory that just compensation is due because a rent control ordinance has not substantially advanced the legislative purpose advanced in justification of the resulting restriction of property owner's rights is one of first impression in this court. It is not novel, however. The Supreme Court recognized that an owner of rent-controlled property may offer evidence to demonstrate that the circumstances which once justified imposition of rent control no longer do so in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 [(1924)].

App. A-71 (Baxter, J., dissenting).

Finally, unlike the majority, Justice Baxter perceived the key constitutional distinction between a *facial* challenge to the legitimacy of a legislative enactment, and allegations such as

SMB's, questioning whether the *application* of the law in fact advances its legitimate police power objectives:

> Although whether on its face this ordinance exceeds the permissible scope of the police power could be resolved by the court without taking evidence, the question posed by plaintiff in the complaint is whether over time the ordinance has substantially advanced the legislative purpose. This question cannot be decided on demurrer. ***If plaintiff can prove that the rent control ordinance has not substantially advanced its purpose, or that application of the ordinance to its property does not substantially advance the purpose, the "compensable taking" element of a cause of action for inverse condemnation would be established.*** This is true notwithstanding that the City may be able to show that there was a rational basis for the law when it was adopted.

App. A-50 (Baxter, J. dissenting) (emphasis added).

3. Justice Chin's Dissent Scores the Majority for Trying to "Alchemize" this Court's "Substantial Advancement" Test for Regulatory Takings into a Deferential Due Process Standard of Review

In his separate dissent, Justice Chin recognized that the majority had interpreted *Nollan's* "substantial advancement" test in a way that left it indistinguishable from the deferential "rational basis" standard applicable to substantive due process claims:

> We as judges write judicial opinions and articulate legal standards because we believe that words, though imperfect, have the power to convey objective meaning. And if words have that power, then a requirement that a law "'substantially advance'

> the 'legitimate state interest' sought to be achieved" is different from a requirement that a law not be "arbitrary," and, of course, it is different from a requirement that a law have a "rational basis." Nevertheless, the majority grafts these deferential due process standards onto the substantially advance standard.

App. A-91 (Chin, J., dissenting) (citation to *Nollan* omitted). By attempting to "alchemize" this Court's *Nollan* doctrine into a deferential substantive due process standard of review, Justice Chin objected, the majority rendered this Court's substantial advancement test "a mere vacuous shell." App. A-89, 91.

4. Justice Brown's Dissent Asks This Court to Address the Issue of the Applicability of *Nollan* to Regulatory Taking Challenges of This Kind

In the third dissenting opinion below, Justice Brown reproved the majority for evading the "substantial advancement" test mandated by this Court in *Nollan*. Like the New York Court of Appeals,[3] Justice Brown saw the issue as one of minimum constitutional standards established by this Court, which state courts lack authority to diminish under the Supremacy Clause:

> Instead of attempting to measure the actual fit between [the application of] the city's rent ceiling and its fact-based justifications for the ordinance, the majority applies an enfeebled rational basis standard, and contents itself with supposing that some generalized conception of the public good might be promoted by the means chosen. But a laissez-faire

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[3] *See Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Nollan* and other decisions "establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause").

> attitude toward takings claims is no longer good enough. The United States Supreme Court's precedents appear to establish a minimal level of protection which this court lacks authority to diminish. . . . ***If such measures are capable of withstanding a Nollan-inspired takings clause analysis, the high court ought to tell us so, preferably sooner rather than later.***

App. A-110-11, A-113 (Brown, J., dissenting) (emphasis added).

In sum, three justices of the California Supreme Court strongly dissented from the opinion below, and a fourth expressly looked to this Court for guidance. Petitioner Santa Monica Beach, Ltd., now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on this important question of federal constitutional law.

REASONS FOR GRANTING THE PETITION

In the decision below, the California Supreme Court ruled that property owners in that state may not present evidence to show that the application of rent regulations to their property fails to substantially advance legitimate state interests. This violates the fundamental notion of distributive fairness underlying the Fifth Amendment's Takings Clause. Owners of rental property are singled out to bear special burdens to provide public benefits to the poor, minorities, and other disadvantaged tenant groups, yet are not allowed to present proof that the application of the law in question fails to accomplish its objectives.

This is the latest in a series of decisions in which the California Supreme Court has systematically diminished the federal constitutional rights of its citizens far below the minimum threshold established by this Court's Takings Clause

jurisprudence.[4] As a dissenting justice in the proceeding below noted, the decision of the majority was based on "the conviction that more than a decade of reinvigorated takings jurisprudence has changed nothing." App. A-98 (Brown, J., dissenting). If the decision below is allowed to stand, this Court's landmark decision in *Nollan v. California Coastal Commission* will be limited to its facts for future California litigants. *Nollan* will thus join *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* and *Lucas v. South Carolina Coastal Council*, as important decisions of this Court whose protections of federal constitutional rights have been eviscerated by the court below.

In refusing to apply *Nollan's* substantial advancement analysis to SMB's regulatory taking claim the California Supreme Court also comes into conflict with decisions of the Ninth Circuit Court of Appeals and the highest state court of New York on federal Takings Clause issues. The majority opinion below stands in direct opposition to *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 168 (1998), and to the opinions of the New York Court of Appeals in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).

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[4] *See Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 16 Cal. 4th 761, 782 (1998) (contrary to this Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), just compensation for a regulatory taking not available in California if a due process remedy is "available and adequate"); *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 17 Cal. 4th 1006 (1998) (contrary to this Court's holdings in *First English* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), just compensation for temporary deprivation of all economically viable use not available in California for time spent in litigation against unconstitutional imposition of regulatory authority).

This Court should grant certiorari in order to resolve the conflicts between the California Supreme Court and this Court, the Ninth Circuit, and the highest state court of New York, on important federal constitutional issues arising under the Takings Clause.

I

THE FUNDAMENTAL NOTION OF FAIRNESS UNDERLYING THE TAKINGS CLAUSE IS VIOLATED WHEN LANDOWNERS ARE SINGLED OUT TO BEAR THE FULL COSTS OF GENERAL PUBLIC BENEFITS YET ARE NOT ALLOWED TO PROVE THAT THE APPLICATION OF THE REGULATIONS IN QUESTION FAILS TO DELIVER THOSE BENEFITS

The essence of the Fifth Amendment's Takings Clause[5] is an equitable inquiry. The purpose of the clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Santa Monica's Rent Control Law singles out the owners of residential rental housing to bear the full costs of making below-market (in effect, privately subsidized) accommodations available to "the poor, minorities, students, young families, and senior citizens." App. A-2.

Petitioner does not dispute that preserving and increasing the supply of affordable housing available to these disadvantaged population groups is a legitimate objective of government. As a Justice of this Court has noted in a similar context,

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[5] The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This federal prohibition was extended to the states through the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Company v. City of Chicago*, 166 U.S. 226 (1897).

> [t]he traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities--a problem caused by the society at large--has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals.

Pennell v. City of San Jose, 485 U.S. 1, 21-22 (1988) (Scalia, J., concurring in part and dissenting in part) (citation to *Armstrong* omitted). The issue in this lawsuit, however, is not whether the costs of providing public benefits to disadvantaged tenants may be disproportionately concentrated on the owners of rental housing. The court below has gone farther than this, and has upheld the application of such a cost-shifting regulation even while acknowledging that the application of the law not only fails to produce the public benefits that justified its adoption, but actually exacerbates the problems it was adopted to relieve!

In short, the decision below holds that rental property owners can be singled out to bear special financial burdens in the name of providing general public benefits--even if no such benefits are in fact provided![6] This is an especially egregious example of forcing a small group of individuals to bear the full

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[6] "In effect, the majority concedes the ordinance does not further its stated goal of 'providing affordable housing for the poor, the elderly and young families.'" App. A-111 (Brown, J., dissenting).

costs of burdens that, in fairness and justice, should be borne by the public as a whole.

> The Santa Monica rent control ordinance forces owners of rental property to bear what should be a public burden. It thus creates a taking of property from any owner of rental property to which it is applied, a taking for which the takings clause mandates just compensation.

App. A-88 (Baxter, J., dissenting).

II

UNDER THE "SUBSTANTIAL ADVANCEMENT" STANDARD ENUNCIATED BY THIS COURT IN *NOLLAN*, SMB IS ENTITLED TO PRESENT EVIDENCE THAT THE APPLICATION OF THE RENT CONTROL LAW TO ITS PROPERTY BEARS "NO RELATION AT ALL" TO ACCOMPLISHING THE LAW'S LEGITIMATE OBJECTIVES

The facts alleged in SMB's complaint (which must be deemed proven for purposes of this appeal)[7] show that, in the words of the Court of Appeal, the application of Santa Monica's Rent Control Law in this case "has no relationship (nexus) at all to its stated purpose." App. B-16. Nevertheless, the California Supreme Court concluded these facts did not state a claim for a regulatory taking under this Court's requirement that there must be "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992).

This amounts to a repudiation of this Court's modern regulatory taking doctrine by the highest state court of California. This was recognized even by one of the justices in

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[7] App. A-44-45 ("In ruling on the sufficiency of a complaint to withstand a demurrer, i.e., to state a cause of action, the court assumes the truth of all well-pleaded allegations.").

the majority below, prompting a plea for this Court to clarify the applicability of *Nollan's* substantial advancement standard outside the factual context of a permit conditioning scheme:

> [A]s the differing positions held by members of this court in this case show, there are grounds for reasonable debate as to the meaning of that test in just compensation law outside the *Nollan/Dolan* context. Does it require only a rational relationship between the regulation and its purpose? Or a closer connection between means and ends, adapted from the *Nollan/Dolan* test? Or some other degree of connection between means and ends? I urge the high court to resolve this uncertainty.

App. A-36-37 (Kennard, J. concurring). Petitioner SMB respectfully concurs with Justice Kennard and with the three dissenting justices below, in asking this Court to grant the petition for certiorari to resolve this issue.

A. *Nollan* Requires Meaningful Means-Ends Scrutiny When the Application of Land Use Regulations Is Challenged Under the Takings Clause

Outside the state courts of California, it is generally recognized that this Court in *Nollan* "expressly endorsed a form of semi-strict or heightened judicial scrutiny of regulatory means-ends relationships." Frank Michelman, *Takings, 1987*, 88 Columb. L. Rev. 1600, 1607-08 (1988). The language of the decision does not suggest that this Court intended to limit the *Nollan* analysis to the facts of that case. Indeed, *Nollan's* Footnote 3 appears to constitute an across-the-board rejection of the "rational basis" standard in regulatory taking cases:

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have*

> *decided*' the measure adopted might achieve the State's objective."

483 U.S. at 835 n.3 (citations omitted).

Commentators have recognized that the *Nollan* analysis is especially important in evaluating as-applied regulatory taking challenges:

> As the Court noted in *Nollan*, the nexus required must connect not only regulatory means and ends, but also the need for a ***particular regulatory imposition on a particular landowner.***

Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 Harv. J. L. & Pub. Pol'y 147, 155 (1995) (emphasis added, footnote omitted). This focus on the effect of the *application* of land use regulations was reemphasized in *Dolan v. City of Tigard*, 512 U.S. 374 (1994):

> The decision in *Dolan v. City of Tigard* supplements the *Nollan* nexus between regulation and legitimate public purpose with a second-tier inquiry to determine "rough proportionality" between the regulatory program ***and its specific application***.

Daniel J. Curtin, Jr., and Jonathan M. Davidson, *Life After Dolan: Review of the Cases*, 27 Urb. Law. 874, 874 (1995) (emphasis added). In effect, this implies a requirement of both an ends-means and a cause-effect nexus:

> In [*Nollan*], the Court articulated two different understandings of the relationship required for a regulation to "substantially advance a legitimate state interest" in takings law. The Court described the "substantially advance" test as one that examines whether the regulation actually achieves its stated purpose: a means-end test. Additionally, the Court described the "substantially advance" test as one that examines the proportionate relationship between the amount of

> public harm caused by the owner and the regulatory burden imposed: a cause-effect test.

Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 602 (1998) (footnotes omitted).

Establishing the presence or absence of such a nexus is, of course, a fact-intensive inquiry requiring the examination and weighing of evidence at trial. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). It cannot under any circumstances be disposed of via demurrer. Plaintiffs such as SMB must be allowed to put on evidence showing that the application of restrictive land use regulations fails to meet *Nollan's* substantial advancement requirement.

B. By Reducing *Nollan's* Substantial Advancement Requirement to an Especially Deferential Form of Rational Basis Review, the California Supreme Court Has Drained the Substance from This Court's Reinvigorated Regulatory Taking Jurisprudence

Despite this Court's clear language in *Nollan*, and the application of *Nollan's* ends-means inquiry in a rent control context by this Court and by other state and federal courts, the court below instead chose to employ an extremely deferential form of rational basis review. In evaluating the takings impact of the application of rent regulations in California, the substantial advancement standard now means the aggrieved landowner "bears the burden of proving that the regulation 'constitutes an arbitrary regulation of property rights.'" App. A-14. Ultimately, the California Supreme Court found *Nollan's* nexus requirement satisfied because the City of Santa Monica desired to control SMB's property, and the application of the Rent Control Law enabled it to accomplish this objective. App. A-22.

As Justice Brown noted in dissent, this collapsing of "substantial advancement" into "rational basis" reflects the

majority's "conviction that more than a decade of reinvigorated takings jurisprudence has changed nothing." App. A-98. Until the California Supreme Court addressed this issue, it had been understood that

> *Nollan* established that a meaningful, heightened, nexus scrutiny of governmental regulation of property rights is, henceforth[,] the governing norm.

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 Neb. L. Rev. 186, 211 (1991). Even authorities clearly hostile to the exercise of private property rights agreed:

> Between the demise of *Lochner* and [the *Nollan*] decision, the Court's review of the rationality of state exercise of police power was based upon a presumption of rationality. . . . [In *Nollan*] Justice Scalia disregards this time-honored deference to legislative decision making and replaces it with a test that requires greater judicial scrutiny.

Cotton C. Harness, III, *Lucas v. South Carolina Coastal Council: Its Historic Context and Shifting Constitutional Principles*, 10 Pace Envt'l. L. Rev. 5, 17 (1992). After the decision below, however, *Nollan's* requirement of heightened ends-means review is a dead letter in California. If this standard can be satisfied by the application of any regulation that possesses a conceivably rational basis for its enactment, there is no longer any distinction between the standards applicable to regulatory takings and "those applied to due process or equal protection claims." *Nollan*, 483 U.S. at 835 n.3. It is as if this Court's *Nollan* decision never existed.

C. Controlling the Use of Land for Its Own Sake--With No Underlying Rationale Except That of Redistributional Politics--Does Not Satisfy the Meaningful Ends-Means Nexus Required by *Nollan*

Evaluating the application of a land use regulation under the substantial advancement test

> requires a judicial assessment based on the facts of each owner's use, the legitimacy and importance of the purposes embodied in the regulation, the predicted effects of the regulation, and the appropriateness of the means chosen.

McUsic, 92 Nw. U. L. Rev. at 655. In stark contrast, the majority below claim to have met this standard by the invocation of a tautology: the Rent Control Law states that its purpose is to control rents, which SMB does not deny it has accomplished. App. A-19-22. This, under the deferential approach taken by the majority below, is sufficient to satisfy the requirement that the application of the law to SMB substantially advances legitimate state interests. *Id.*

This Court has already considered and rejected such a tautological rationale for rent control in *Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924). There, Justice Holmes acknowledged that the mere desire to control rents for its own sake, without more, "is not in itself a justification" for the application of rent control to the petitioner's property. *Id.* at 548. However, the majority below found themselves no more bound by *Chastleton Corporation* than by *Nollan*, dismissing this Court's protection of Fifth Amendment rights as "'a *Lochner*-era case the validity of which is questionable at best.'" App. A-23 (footnote and citation omitted). Despite the urging of the dissenting justices, the majority were apparently oblivious to the distinction between the substantive due process analysis of *Lochner v. New York*, 198 U.S. 45 (1905), and the regulatory

taking standards applicable to *Chastleton Corporation*, *Nollan*, and the case at bar.

Ironically, the majority opinion below in fact seems to be modeled on Justice Brennan's ***dissent*** in *Nollan*.[8] In that case, the dissent argued that the substantial advancement test was in fact satisfied, since the objective of the regulation in question was to convert private beaches into public beaches, and its application to the Nollans did just that. *Nollan*, 483 U.S. at 850-53 (Brennan, J. dissenting). Similarly, the majority below are satisfied to find an essential nexus between the desire of Santa Monica's dominant political faction to transfer private housing resources to itself, and the application of a law that (the court assumes) does just that.

The New York Court of Appeals, vigorously applying *Nollan* to a rent control scheme in that state, has put the point well:

> The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus. . . . The Constitution forbids State action by fiat, no matter the economic equation.

Manocherian v. Lenox Hill Hospital, 643 N.E.2d at 486. The court below, in contrast, would rationalize regulation by fiat as somehow consistent with this Court's substantial advancement

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[8] This is the second time in less than a year that the California Supreme Court has apparently adopted the rationale of a dissent from a regulatory taking decision of this Court. *See Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006 (adopting the position Justice Stevens advanced in his dissenting opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 334, that litigation over the validity of a land use restriction is simply a "normal delay" in the permit approval process and, therefore, cannot give rise to a temporary taking).

standard. Allowing this decision to stand would, as Justice Chin observed, render this Court's regulatory taking formulations "a mere vacuous shell." App. A-91 (Chin, dissenting).

III

THE RULING BELOW, THAT THIS COURT'S "SUBSTANTIAL ADVANCEMENT" STANDARD IS INAPPLICABLE TO RENT CONTROL, CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *RICHARDSON v. CITY AND COUNTY OF HONOLULU*

The central holding of the court below is that this Court's "substantial advancement" test, as articulated in *Nollan*, "is applied differently depending on the type of government action under consideration," App. A-14, and collapses to a rational basis standard when applied to rent control. App. A-15-18. This doctrine directly conflicts with *Richardson v. City and County of Honolulu*, 124 F.3d 1150, a recent decision of the Ninth Circuit Court of Appeals.

In *Richardson*, the Ninth Circuit applied *Nollan* to strike down a Honolulu rent control ordinance for failure to substantially advance its stated objectives. The federal appellate panel based its analysis in part on this Court's admonition that a regulatory taking challenge to a rent control law may turn on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 1165 (quoting *Yee v. City of Escondido*, 503 U.S. at 530 (citing *Nollan*)).

The plaintiff in *Richardson*, like the present Petitioner, raised a *Nollan*-based challenge,

> contend[ing] that Ordinance 91-96 fails to substantially further its stated public purposes and, therefore, constitutes a regulatory taking.

Id. at 1164. The Ninth Circuit agreed. Closely scrutinizing the Honolulu measure's objectives and effects, the federal panel struck down Ordinance 91-96 for failing to substantially advance its admittedly legitimate objectives:

> Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. . . . The Ordinance thus effects a regulatory taking.

Id. at 1165-66.

Because the Ninth Circuit's jurisdiction includes California, rental property owners in that state now face radically conflicting levels of protection under the Takings Clause, depending on whether they pursue their claims in state or federal court. This Court should grant the present petition and resolve the conflict between the California Supreme Court and the Ninth Circuit Court of Appeals on this important question of federal constitutional law.

IV

THE DECISION BELOW CONTRIBUTES TO A SYSTEMIC CONFLICT BETWEEN THE HIGHEST STATE COURTS OF CALIFORNIA AND NEW YORK ON THE PROPER STANDARD OF REVIEW FOR FEDERAL CONSTITUTIONAL CLAIMS ARISING UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

In addition to conflicting with the holdings of this Court and the Ninth Circuit, the decision below contributes to a long-standing conflict between the decisions of the highest state courts of California and New York on federal takings issues.

This conflict between the courts of the most populous states of the Union on important federal questions can only be resolved by a timely and forceful ruling by this Court.

In contrast to the apparent dedication of the majority below to evade this Court's teaching in *Nollan* and *Dolan*, the highest court of the State of New York has applied the "substantial advancement" analysis set forth in these cases to strike down overzealous regulation of private rental property. In *Seawall Associates v. City of New York*, 542 N.E. 2d 1059, the New York Court of Appeals overturned Local Law 9, a regulation that prohibited the conversion or demolition of single room occupancy (SRO) residential hotels. The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing. A group of owners sued the city, arguing that, *inter alia*, Local Law 9 violated the Takings Clause by failing to substantially advance its admittedly legitimate objectives.

Partly because of evidence that Local Law 9 could not significantly advance its stated goal of relieving homelessness, the state high court found that "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural." 542 N.E.2d at 1069. The court expressly recognized and applied "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as required by *Nollan*. *Id.* at 1068.

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479. In striking down a rent control measure under the Takings Clause, the New York panel observed that *Nollan* and *Dolan* "establish a ***constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause***." *Id.* at 482 (emphasis added). Applying the ends-means scrutiny required by this Court, the Court of Appeals found that the

challenged measure effected a taking because it "suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest" as required by *Nollan* and *Dolan*. *Id.* at 480.

In sharp contrast to the New York court's regard for the Supremacy Clause, the California Supreme Court in the majority opinion below effectively limited this Court's *Nollan* and *Dolan* rulings to their facts. By declaring, "the 'substantially advance' standard in the takings context is applied differently depending on the type of government action under consideration," App A-14, the Court below drained any content from this Court's protections of Fifth Amendment Rights. As Justice Chin aptly noted in dissent, the majority's recharacterization of the substantial advancement test as the equivalent of a rational basis standard "renders it a mere vacuous shell." App. A-91 (Chin, J., dissenting).

By adopting a stance of virtually total deference to the regulatory enactments of local political factions, the court below has come into direct conflict with the rigorous application of *Nollan* and *Dolan* by the New York Court of Appeals. Instead of joining New York in applying the close ends-means scrutiny mandated by this Court in *Nollan* and *Dolan*, California has turned back the clock to pre-*Nollan* jurisprudence, garbling the substantial advancement standard so as to arrive at a more deferential test for regulatory takings than this Court has ever accepted. This Court should grant certiorari in order to resolve this conflict between the two largest states in the Nation, as well as the split between the state and federal courts in California, on important federal questions arising under the Takings Clause.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be GRANTED.

DATED: March, 1999.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

APPENDIX
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Filed 1/4/99

IN THE SUPREME COURT OF CALIFORNIA

SANTA MONICA BEACH, LTD.,	)	S052824
	)	
Petitioner,	)	Ct. App. 2/1
	)	B097056
v.	)	
	)	
THE SUPERIOR COURT OF LOS ANGELES COUNTY,	)	
	)	
	)	Los Angeles
Respondent;	)	Super. Ct.
	)	No. SS005266
	)	
SANTA MONICA RENT CONTROL BOARD,	)	
	)	
Real Party in Interest.	)	
	)	

In this case we consider whether a trial court properly sustained a demurrer to a complaint alleging that a city's rent control law violates the takings clause of the Fifth Amendment to the United States Constitution and the equivalent provision under the California Constitution because of that law's alleged failure to fulfill its stated objectives. We conclude that the trial court was correct to sustain the Santa Monica Rent Control Board's demurrer to petitioner's cause of action for inverse condemnation, and we accordingly reverse the Court of Appeal's judgment.

I. Statement of Facts

Petitioner Santa Monica Beach, Ltd. (SMB), alleged the following in its complaint for inverse condemnation and petition

for writ of mandate, which we accept as true for purposes of assessing the complaint's sufficiency to withstand a demurrer. (*Quelimane Co.* v. *Stuart Title Guaranty Co.* (1998) 19 Cal.4th 26, 34, fn. 3.)

In April 1979, the City of Santa Monica (the City) adopted a rent control charter amendment (hereinafter sometimes the Rent Control Law) and created an elected rent control board (Board) to regulate rentals. Among other things, the Rent Control Law requires that owners register each rental unit and pay annual registration fees to the Board, establishes maximum allowable rents, provides for annual general adjustments and individual adjustments of allowable rents, prohibits evictions except for specified reasons, and prescribes remedies for violations of its provisions.

The stated purpose of the Rent Control Law, as expressed in the preamble to the charter amendment, was as follows: "A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return."

SMB alleges that in practice, however, rent control has been an agent of "gentrification" in Santa Monica. During the rent-controlled decade of the 1980's, Santa Monica experienced a loss of 775 low-income-renter households, a decrease of nearly 12 percent. The number of low-income-renter households

increased over this period in every comparable city in Southern California without rent control. Santa Monica also lost 285 very-low-income-renter households. This was the largest decrease in the number of very-low-income renters of any comparable Southern California city.

Concurrent with this exodus of economically disadvantaged renters under rent control, Santa Monica experienced a 37 percent increase in the proportion of households with very high incomes between 1980 and 1990. This population shift toward upper-income households occurred during a decade when the proportion of very-high-income households dropped by more than 8 percent in Los Angeles County as a whole.

Under rent control, housing in Santa Monica has become increasingly unavailable to young families. Between 1980 and 1990, the number of family households with children in Santa Monica fell by 1,299, a decline of more than 6 percent. No comparable city in Southern California without rent control lost family households over the decade of the 1980's.

The impact of rent control has been especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under 18 in Santa Monica fell by 593 between 1980 and 1990, a decrease of more than 27 percent, despite an increase in such households in Los Angeles County as a whole.

Under rent control, Santa Monica's elderly population (age 65 or over) declined by 1.7 percent between 1980 and 1990, whereas the elderly population of Los Angeles County rose by more than 15 percent over the same decade. The elderly population increased over this period in every comparable city without rent control in Southern California.

In March 1992 SMB, the owner of a 12-unit residential rental property in the City of Santa Monica filed a petition asking the Board for permission to increase its rents. To obtain permission, SMB had to prove that its property was producing

less than a "fair return" under "a comparative Net Operating Income (NOI) analysis that compares the NOI of calendar year 1978 to that of calendar year 1991, the most recent year prior to the filing of" SMB's 1992 petition. In May, after an administrative hearing, the Board's hearing examiner found that SMB's operating expenses for the base year of 1978 were $14,879, but that SMB was not entitled to a rent increase. SMB appealed to the Board, without success.

After various modifications to the Rent Control Law not relevant here, SMB filed on March 30, 1993, a second petition with the Board, this time asking for permission to increase its rents based upon its income and expenses for 1992. A hearing examiner found that SMB was entitled "to a permanent rent increase of $3 per unit per month and temporary rent increases averaging $58 per unit per month." SMB appealed to the Board, contending, inter alia, that the hearing examiner improperly applied the law and regulations to reduce SMB's rent increase entitlement based on SMB's 1992 NOI and to permanently deny SMB three-fourths of the general rent adjustment to be implemented in 1993 and 1994. The Board affirmed the hearing examiner's determinations.

SMB filed a combined complaint for inverse condemnation and petition for a writ of administrative mandate, naming the Board as defendant and respondent and contending that, as applied to SMB, the Rent Control Law constitutes a compensable regulatory taking of its property. In its inverse condemnation claim, SMB claims the Board has, by application of the Rent Control Law, violated SMB's rights under the Fifth Amendment rights to the United States Constitution and its rights under Article I, section 19 of the California Constitution.

Specifically, SMB claims the Rent Control Law does not meet the "substantial advancement" test articulated by the United States Supreme Court in takings cases, as discussed below, because the Rent Control Law fails "to substantially mitigate some social harm that would otherwise result from the

[property] owner's unregulated use of [its] property" and by "fail[ing] in practice to advance the specific purpose stated in the regulation. . . . Because [the Board's] application of the [Rent Control Law] has reduced the availability of private rental housing in Santa Monica and has made it more difficult for low-income renters, young families, and the elderly to find affordable rental housing, the [Rent Control Law] is not substantially advancing its stated purpose of implementing the housing policies of the [C]ity with regard to these population groups. [¶] The . . . Board's final determination regarding [SMB's 1993 petition] does not substantially advance a legitimate governmental interest, nor is there any close nexus between the denial of [SMB's] application for a fair rate of return on capital investments and any public harm that might result from [SMB's] unregulated operation of [its] property, because unregulated use of [its] property by [SMB] would not have resulted in the problems allegedly addressed by the [Rent Control Law], i.e., a shortage of available housing for low-income renters, young families, and the elderly."

Additional allegations within the inverse condemnation complaint charge the Board generally with depriving SMB of "essential attributes of ownership of its property, including the right to exclude others and the right to determine the terms upon which leasehold interests in [SMB's] property will be alienated." SMB "has received no compensation for the damages inflicted by [the City's] application of the [Rent Control Law] to [SMB's] property, and the [Rent Control Law] contains no provision for seeking or obtaining compensation."

For each and all of these reasons, SMB alleges, the Board's application of the Rent Control Law to SMB's property "comprises a regulatory taking of [SMB's] property for public use without just compensation . . . . [¶] A trial de novo is necessary to examine the constitutional issues in this case. The administrative record compiled by the Rent Board is inadequate for this purpose because the Rent Board does not conduct the

kind of judicial proceedings needed to safeguard [SMB's] fundamental right to due process of law or its right not to be deprived of its property without just compensation. . . ."

SMB's petition for a writ of administrative mandate alleges that the Board acted without or in excess of its jurisdiction under the Rent Control Law and that the Board's actions frustrated its ability to obtain a fair return from its rental property.

The Board demurred to the claim for inverse condemnation, contending that, as a matter of law, SMB could not prevail because there was a "rational basis" for the Rent Control Law. The trial court agreed and sustained the demurrer without leave to amend, leaving the administrative mandate petition to be heard at a later date. SMB filed a petition for a writ of mandate with the Court of Appeal, claiming the inverse condemnation action was inextricably related to its administrative mandate, and that the demurrer had been wrongly sustained.

The Court of Appeal issued an order to show cause and subsequently set aside the trial court's judgment. It agreed with SMB that a heightened standard of scrutiny applied to Rent Control Law under *Nollan* v. *California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*), and, if the allegations were true, that the Rent Control Law's failure to meet its stated purposes meant that it failed to substantially advance a legitimate government purpose, and was therefore a taking of property. The court made clear, however, that in its view even under a more deferential "rational basis" test, the rent control ordinance would fail. "If, in fact, [the] Rent Control Law has reduced rather than increased the number of rental units available to those intended to be benefited by that law, then the regulation has no relationship (nexus) at all to its stated purpose. Deference to legislative authority cannot salvage a regulation that defeats rather than accomplishes its stated purpose."

We granted review and initially deferred briefing pending resolution of another case involving the Rent Control Law, *Kavanau* v. *Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761. That case, however, did not directly address the novel constitutional theory advanced by SMB and accepted by the Court of Appeal. We ordered further briefing to determine the merits of SMB's constitutional claim.

II. Discussion

A. Statute of Limitations

We begin by addressing the Board's contention that SMB's challenge to the imposition of the Rent Control Law is actually a facial challenge, and therefore barred by the statute of limitations. (See *Sandpiper Mobile Village* v. *City of Carpinteria* (1992) 10 Cal.App.4th 542, 549 [holding there is a five-year statute of limitation for real property takings challenges].) SMB contends, on the other hand, that its inverse condemnation action is an as applied challenge, and is timely brought. Generally, "[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe* v. *City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) On the other hand, "[a]n as applied challenge may seek . . . relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied . . . ." (*Ibid.*) In the case of rent control laws, facial challenges have been used to invalidate structural features of the law that are inherently confiscatory, i.e. that fail to permit a landlord a fair rate of return. (See, e.g., *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129, 169 (*Birkenfeld*) [inadequate mechanism for adjusting base rents renders rent control charter amendment partially facially unconstitutional].) An as applied challenge is typically based on a showing that the application of the ordinance has left a

particular landlord without the ability to earn a fair return. (See, e.g., *Kavanau* v. *Santa Monica Rent Control Bd.*, *supra*, 16 Cal. 4th at pp. 777-779 (*Kavanau*).)

We recognize that SMB's unusual claim bears resemblance in a number of respects to a facial challenge—it seeks to invalidate the Rent Control Law, not merely its application against one landlord. Nonetheless, for present purposes, our concern is not to label SMB's claim but to determine whether it is barred by the statute of limitations. Because SMB contends that its claim is derived from events occurring *after* the passage of the Rent Control Law, we will proceed to the merits of its claim. In so doing, we leave aside for the moment the problem of determining precisely when SMB's inverse condemnation claim accrued.[1]

B. The Inverse Condemnation Claim

We begin by recognizing the well-established case law of the United States Supreme Court and of this court holding that ordinary rent control statutes are generally constitutionally permissible exercises of governmental authority. In *Pennell* v. *City of San Jose* (1988) 485 U.S. 1 (*Pennell*), the Court stated: "[W]e have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' [Citations.] . . . '[s]tatutes regulating the economic relations of landlords and tenants are not *per se* takings.' [Citation.] Despite *amici's* urging, we see no need to reconsider the constitutionality of rent

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[1] The Board requests that we to take judicial notice of the administrative record in this case, primarily to establish that the present action wass brought 12 years after the enactment of the Rent Control Law. Because the timing of the suit is not directly relevant to the issues presented in this case, we decline to grant the request.

control *per se*." (*Id.* at p. 12, fn. 6; see also *Birkenfeld*, *supra*, 17 Cal.3d at p. 165.)

Many have questioned the wisdom of rent control, and no consensus exists as to whether it is good public policy. (See, e.g., Epstein, *Rent Control and the Theory of Efficient Regulation* (1989) 54 Brooklyn L.Rev. 741, and various responses on pp. 1215-1304 of the same journal.) We emphasize that a decision affirming the constitutionality of a particular rent control law is not in any sense an endorsement of its soundness. (See *Birkenfeld*, *supra*, 17 Cal.3d at p. 159.) "Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties. The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to 'review' legislative determinations. The only function of the court is to determine whether the exercise of legislative power has exceeded constitutional limitations." (*Lockard* v. *City of Los Angeles* (1949) 33 Cal.2d 453, 461-462.)

We also emphasize that both the enactment and administration of rent control laws are subject to a number of constitutional constraints. Particular decisions of public agencies charged with administering rent control may be deemed to be unconstitutional if as a result landlords are deprived of a fair rate of return. (*Kavanau*, *supra*, 16 Cal.4th at p. 778.) Moreover, we have recognized that rent control law must possess certain structural features that safeguard against confiscatory results: "For example, due to the effects of inflation, the law 'may not indefinitely *freeze* the dollar amount of . . . profits without eventually causing confiscatory results.' [Citation.] In addition, when a rent control law establishes a 'base rent' by reference to rents on a specified date, the law should permit adjustments of that base rent for those rental units

that had artificially low rents at that time. [Citation.] Similarly, the law should permit individualized rent adjustments in appropriate cases even if base rent was not artificially low [citation], and the procedural mechanism by which landlords may obtain any of these adjustments must not be prohibitively burdensome [citations]. Among other things, this process may not entail 'a substantially greater incidence and degree of delay than is practically necessary.' [Citations.] In this regard, we recommended that the law permit 'general rental adjustments for all or any class of rental units based on generally applicable factors.' [Citations.]" (*Kavanau*, *supra*, 16 Cal.4th at p. 772.) We accordingly have invalidated part of a rent control law for failing to provide adequate mechanisms for expeditious adjustments of base rents. (*Birkenfeld*, *supra*, 17 Cal.3d at p. 169.) We note that in its administrative mandamus action, SMB contends that the Rent Control Law has deprived it of a fair return on its property, and it remains free to pursue that claim.

SMB's inverse condemnation claim, however, is not based on the ground that the Rent Control Law is confiscatory, either structurally or as administratively applied. Rather, SMB alleges that it can show, through the use of census data, that the demographic groups that the Rent Control Law was allegedly supposed to favor have not in fact benefited from it.[2] The notion

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[2] SMB in its briefing to this court argues for the first time that the broad constitutional issue of the validity of the Rent Control Law itself is not before us and that the inverse condemnation claim cannot be decided without a detailed case-specific factual inquiry. Yet the very nature of SMB's inverse condemnation claim, and the manner in which SMB chose to litigate it in the superior court and the Court of Appeal, raises the broader constitutional issue. SMB does not allege with any particularity in its inverse condemnation claim that the Board's decisions denied it a fair return, reserving such allegation for the

(continued...)

that a court may invalidate legislation that it finds, after a trial, to have failed to live up to expectations, is indeed novel. In our constitutional system, it is generally assumed that only the legislative body that enacted the statute may exercise a power of repeal if that statute fails to meet legislative expectations. (See, e.g., *Ryan* v. *Johnson* (3d Cir. 1997) 115 F.3d 193, 200 [despite court's personal views on shortcoming of statute, it is "the singular role of Congress to amend or repeal [a] . . . statute"].)

SMB's claim is based on its reading of relatively recent United States Supreme Court case law in the area of takings jurisprudence. Before examining its claim in more detail, we first state the basic principles to emerge from this body of law. In determining whether a government regulation of property works a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any "set formula" for determining whether a taking has occurred, preferring to engage in "'essentially ad hoc, factual inquiries'" (*Lucas* v. *South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015), which focus in large part on the economic impact of the regulation (see *Penn Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104, 124; *Keystone Bituminous Coal Assoc.* v. *DeBenedictis* (1987) 480 U.S. 470, 493-501). In the context of rent control and other price controls, this impact analysis takes the form of analyzing whether the regulation impairs "investors' ability to earn a fair return." (*Kavanau*, *supra*, 16 Cal.4th at p. 776.) Other than this ad hoc inquiry, the court has held categorically that property is

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(...continued)
administrative mandamus action, which is not before us. It is the larger constitutional issue of the role of the judiciary in determining whether a rent control law sufficiently advances a government interest to maintain its constitutional validity that is the crux of SMB's inverse condemnation claim, and resolution of this issue was the basis of the Court of Appeal's holding and our grant of review. It is this claim that we now address.

taken when a government regulation "compels [a] property owner to suffer physical invasion of his property" or "denies all economically beneficial or productive use of land." (*Lucas*, *supra*, 505 U.S. at pp. 1015-1016.) The court has also stated that "the Fifth Amendment is violated when a land-use regulation 'does not substantially advance legitimate state interests'" (*Lucas*, *supra*, 505 U.S. at p. 1016.) It is this last prong of the United States Supreme Court's "taking" standard that SMB claims has been violated.

In *Nollan*, *supra*, 483 U.S. 825, 834, the court discussed this "substantially advance" test in the context of a governmental requirement that a property owner dedicate a portion of its property to the public as a condition for obtaining a development permit: "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former substantially advance the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements." (Fn. omitted.) The court further noted that the substantially advance standard is different from the rational basis standard employed in the fields of equal protection and due process. (*Id.* at p. 834, fn. 3.) The court also declared toward the end of its opinion: "As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Id.* at p. 841.)

This standard was further elucidated in *Dolan* v. *City of Tigard* (1994) 512 U.S. 374 (*Dolan*), a case that also concerned required dedications of property as a condition for granting a

development permit. The court concluded that a "rough proportionality" standard "best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at p. 391, fn. omitted.)

The *Dolan* court once again emphasized that conveyances such as were considered in that case were deserving of a greater scrutiny than other land use restrictions. Typical land use regulations such as zoning ordinances "differ in two relevant particulars from the present case. First, they involve essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. . . . Under the well-settled doctrine of 'unconstitutional conditions' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." (512 U.S. at p. 385.) The court further stated in the course of responding to the dissent: "Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an *arbitrary regulation of property rights*. [Citation.] Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." (*Id.* at p. 391, fn. 8, italics added.)

From the above, it can be inferred that the "substantially advance" standard in the takings context is applied differently depending on the type of government action under consideration. As *Nollan* and *Dolan* both attest, government requirements that property owners dedicate land as a condition of receiving a development permit will receive the highest scrutiny—a type of intermediate scrutiny in which a government's dedication requirements will pass constitutional muster as long as the government "make[s] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Dolan*, *supra*, 512 U.S. at p. 391, fn. omitted.) Moreover, although the above formulation in *Dolan* cannot be readily transplanted outside the context of exactions, we have long held that adjudicative land use decisions in general must be justified by factual findings supported by substantial evidence in an administrative record. (*Topanga Assn. for a Scenic Community* v. *County of Los Angeles* (1974) 11 Cal.3d 506, 514-516.) The most deferential review of land use decisions appears to be those that pertain to "essentially legislative determinations" that do not require any physical conveyance of property. A challenger to the validity of a legislative determination, such as a zoning regulation, bears the burden of proving that the regulation "constitutes an arbitrary regulation of property rights." (*Dolan*, *supra*, 512 U.S. at p. 391, fn. 8; see also *Corona-Norco Unified School Dist.* v. *City of Corona* (1993) 17 Cal.App.4th 985, 992 [judicial review of quasi-legislative acts of local agencies by ordinary mandamus is limited to "whether the action was arbitrary, capricious or entirely lacking in evidentiary support"].)

We recognized these different levels of takings scrutiny in *Ehrlich* v. *City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*). We rejected the claim that the *Nollan* and *Dolan* standards do not apply to development fees imposed on an individualized basis as a condition for development. "In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just

such . . . land use 'bargains' between property owners and regulatory bodies—those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development." (12 Cal.4th at p. 868.) But a different standard of scrutiny would apply to development fees that are generally applicable through legislative action "because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." (*Id.* at p. 876; see also *id.* at p. 897 (conc. opn. of Mosk, J.); *id.* at p. 903 (conc. and dis. opn. of Kennard, J.).) Thus, individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*, whereas generally applicable development fees warrant the more deferential review that the *Dolan* court recognized is generally accorded to legislative determinations. (*Dolan*, *supra*, 512 U.S. at p. 391, fn. 8.)

Where does rent control fit within this scheme? It could be argued that rent control is essentially a species of price control rather than a land use regulation, and that the constitutional jurisprudence of price control governs ordinary rent control ordinances. (See *Hutton Park Gardens* v. *Town Council of West Orange* (N.J. 1975) 350 A.2d 1, 7-8, fn. omitted, see also *Birkenfeld*, *supra*, 17 Cal.3d at p. 157.) Those challenging the constitutionality of a legislative scheme of price control must show that "no reasonably conceivable set of facts could establish a rational relationship between the regulation and the government's legitimate ends." (*20th Century Ins. Co.* v. *Garamendi* (1994) 8 Cal.4th 216, 292.) A price control regulation is generally constitutionally challenged with the contention that a particular price or rate regulation is confiscatory, i.e., does not allow a just and reasonable rate to investors. (See, e.g., *20th Century Ins. Co.*, *supra*, 8 Cal.4th at p. 293; *Duquesne Light Co.* v. *Barasch* (1989) 488 U.S. 299, 307-308.) Thus, we recently stated that, "[i]n the context of price control, which includes rent control, courts generally find

that a regulation bears 'a reasonable relationship to a proper legislative purpose' so long as the law does not deprive investors of a 'fair return' and thereby become 'confiscatory.' [Citations.]'" (*Kavanau*, *supra*, 16 Cal.4th at p. 771.) As we also noted in *Kavanau* and *20th Century Ins. Co.*, courts have employed this fair return analysis to price regulation cases whether the contested regulation is denominated as a taking or a deprivation of property without due process. (*Kavanau*, *supra*, 16 Cal.4th at pp. 776-777; *20th Century Ins. Co.*, *supra*, 8 Cal.4th at p. 292; see also *Duquesne Light Co.*, *supra*, 488 U.S. at pp. 307-308.)

We need not decide whether the standard of review for rent control legislation is identical to the rational relationship test employed in other price control schemes. In light of the analysis reviewed above, we believe it is clear at least that the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply in this case. Rather, the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. Thus, the party challenging rent control must show "that it constitutes an arbitrary regulation of property rights." (*Dolan*, *supra*, 512 U.S. at p. 391, fn. 8.) Moreover, as explained below, even if, as SMB contends, the heightened standard in *Nollan* and *Dolan* were applicable here, the trial court acted properly in sustaining the demurrer to SMB's complaint.

The two United States Supreme Court cases to address rent control in the "post-*Nollan*" era are consistent with the above analysis. In *Pennell*, *supra*, 485 U.S. 1, the court rejected a facial challenge to a city's rent control ordinance that contained "hardship to a tenant" as one factor to consider in determining whether to grant rent increases. (*Id.* at p. 4.) The court stated, in rejecting a due process challenge to the law, that a "'[p]rice control [law] is "unconstitutional . . . if arbitrary, discriminatory,

or demonstrably irrelevant to the policy the Legislature is free to adopt . . . ."'" (*Id.* at p. 11.)

The court also held that any takings challenge would be premature, because there was no showing of the actual impact of the "tenant hardship" provision of the San Jose ordinance. (*Pennell, supra*, 485 U.S. at pp. 10-11.) Justice Scalia's dissent, like the majority, took for granted the basic constitutionality of ordinary rent control laws, and would have found the ordinance in question constitutional but for the tenant hardship factor which, in the dissent's view, unfairly imposed on landlords the solution to the "social problem" of having "some renters who are too poor to afford even reasonably priced housing." (*Id.* at p. 21 (dis. opn. of Scalia, J.).) Neither the majority nor dissent suggested that some heightened standard was appropriate for reviewing ordinary rent control law.

In *Yee* v. *City of Escondido* (1992) 503 U.S. 519, the court considered the constitutionality of a mobilehome rent control ordinance. As the court made clear at the outset, the case did not raise the issue of whether ordinary rent control laws violate the takings clause. (*Id.* at p. 526.) The mobilehome ordinance in question had several features that distinguished it from ordinary rent control—a restriction on the ability of the landlord to exit from the mobilehome rental business, and a provision that a mobilehome park tenant had the right to sell his rental to others, without the landlord's consent. The effects of such a regulatory scheme was allegedly to permit existing tenants to appropriate all the savings that result from rent control, rather than, as in the case of ordinary rent control, having those savings be distributed among both present and future tenants. (*Id.* at p. 530.) The issue before the *Yee* court was whether such a regulatory scheme constituted a *physical* taking of property, and the court determined that it did not. (*Id.* at p. 532.) The court stated in dictum that the peculiar features of this type of rent control law might "have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed

some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." (*Id.* at p. 530.) Thus, the court's dictum suggested that the mobilehome rent control scheme of regulation would be scrutinized to determine whether those restrictive regulations advanced a legitimate government interest. The opinion did not suggest that such restrictions were unconstitutional, nor did it elaborate upon the "substantially advanced" standard in this context. Still less did it hold or imply that in the case of ordinary rent control, there was a new, heightened standard of review.

With this background in mind we turn to the present case. SMB's complaint focuses on certain of the stated goals of rent control found in the preamble to the charter amendment—providing affordable housing for the poor, the elderly, and young families—and has alleged that rent control has failed to achieve these goals. As will appear below, these allegations, even if true, do not adequately state an inverse condemnation claim.

As the United States Supreme Court affirmed in *Nollan*, "a broad range of governmental purposes and regulations" are constitutionally valid under the takings clause. (*Nollan*, *supra*, 483 U.S. at pp. 834-835.) One of the purposes that the court has explicitly recognized as valid after *Nollan* is that of "'prevent[ing] excessive and unreasonable rent increases' caused by the 'growing shortage of and increasing demand for housing'" within a municipality. (*Pennell*, *supra*, 485 U.S. at p. 12.) SMB does not allege that the Santa Monica Rent Control Law fails to advance the purpose of "preventing excessive and unreasonable rent increases caused by the . . . shortage of and increased demand for housing" in the City or that existing tenants have not obtained protection from excessive or unreasonable rent increases. Therefore, even if we assume that some sort of intermediate judicial scrutiny, patterned after the *Nollan* and *Dolan* cases, were applicable to judicial review of rent control, SMB's complaint does not adequately allege that

the Rent Control Law fails to substantially advance *some* legitimate state purpose.

SMB contends essentially that in considering the legitimate purposes of the Rent Control Law, we must confine ourselves to the stated purposes of that law. But even if that were true, there is no justification for SMB's truncated reading of the law's purposes. The charter amendment spoke of a housing shortage "resulting in a low vacancy rate and rapidly rising rents . . . affecting the lives of a substantial portion of those Santa Monica residents residing in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of *Santa Monica tenants*, especially the poor, minorities, students, young families, and senior citizens. *The purpose of this Article*, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return." (Italics added.) We agree with the Ninth Circuit, which, in rejecting an almost identical challenge to Santa Monica's Rent Control Law, stated: "[Plaintiff] contends that the Rent Control Law does not 'substantially advance' its purpose, which she misperceives as only to help the poor, elderly, minorities, and families with children. The Rent Control Law's stated purpose is to help *all* Santa Monica tenants, not just those within the mentioned groups, and not those who wish to become tenants there. [Citation.] Controlling rents to a reasonable level and limiting evictions substantially alleviate hardships to Santa Monica tenants. That rent control may unduly disadvantage others, or that it may exert adverse long-term effects on the housing market, are matters for political argument and resolution; they do not affect the constitutionality of the Rent Control Law." (*Schnuck* v. *City of Santa Monica* (9th Cir. 1991) 935 F.2d 171, 175, italics in original, fns. omitted.)

Moreover, there is no constitutional requirement that the inquiry into whether the legislation substantially serves legitimate goals must be limited to stated goals, much less to only some of the stated goals. "Legislative bodies have broad scope to experiment with economic problems . . . ." (*Ferguson* v. *Skrupa* (1962) 372 U.S. 726, 730.) It appears elementary that any complex piece of social or economic legislation will often have unanticipated consequences that can be both beneficial and detrimental, and that the legislative body or the electorate that enacted the legislation must be entrusted to weigh *whatever* harms and benefits result from the legislation in determining whether that legislation should be amended or abrogated. There is simply no authority for the proposition that a piece of legislation that advances legitimate goals, but not precisely those goals specified in its preamble, may be struck down by a court as unconstitutional.

Accordingly, the prevention of "'excessive and unreasonable rent increases' caused by the 'growing shortage of and increasing demand for housing'" in the City (*Pennell, supra*, 485 U.S. at p. 12) is a legitimate government interest whether or not that goal is precisely identified in the text of the law's preamble and whether the primary beneficiaries of such protection are tenants with low or merely moderate income. The assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose. (See, e.g., Gov. Code, § 65583, subd. (c)(2) [local communities must set forth in housing elements of their general plan a program that will "assist in the development of adequate housing to meet the needs of low- *and moderate*-income households" (italics added)].) Nor does SMB allege that *no* poor, minority or elderly tenants have benefited from rent control, only that they did not benefit as much as a class in Santa Monica as they did in other locales that did not have rent control. Thus, the complaint does not allege that even the limited goals identified by SMB have been completely frustrated.

Moreover, a rent control law, even if imperfect, may protect existing tenants, including the poor and elderly, from being displaced due to rising rents in a tight rental market. As the Supreme Court stated in upholding Article XIII A of the California Constitution (Proposition 13) against an equal protection challenge brought by property owners who objected to the greatly disparate property tax burdens that provision had created: "[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability. [Citation.] The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification . . . ." (*Nordlinger* v. *Hahn* (1992) 505 U.S. 1, 12.) So too, a legitimate goal of rent control may be to stabilize communities in much the same way, by preventing sharply escalating rents from forcing tenants to move (see Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein* (1989) 54 Brooklyn L.Rev. 1239), even if its benefits are not limited to targeted demographic groups.

SMB purports to find support for its position that the legislation must be measured against stated purposes from the statement in *Nollan, supra*, 483 U.S. at page 834, footnote 3: "Contrary to [the dissent's] claim, . . . our opinions do not establish that the [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved [citation], not that 'the State' could *rationally have decided* that the measure adopted might achieve the State's objective." The *Nollan* court also noted that in the development permit/dedication context, there is the "heightened risk that the purpose is avoidance of the compensation requirement, rather than the *stated* police-power objective." (*Id.* at p. 841, italics added.) But these statements do not aid SMB.

As discussed, the Rent Control Law has the broad stated purpose of "alleviat[ing] the hardship caused by th[e] serious housing shortage" in Santa Monica for the general benefit of tenants, and SMB does not allege that it has failed to do so.

Furthermore, *Nollan* implies, and *Dolan* more explicitly states, that the standard of review for land use *legislation* is different from the standard of review when the court considers a property dedication in exchange for a development permit—a particular type of *adjudicative* determination. It is one thing for courts to make a government agency adhere to its own justification for requiring the dedication of a particular portion of property as a condition of development; such adherence safeguards against the possibility that the justification is merely a pretext for taking the property without paying compensation. (See *Nollan*, *supra*, 483 U.S. at p. 841; *Ehrlich*, *supra*, 12 Cal.4th at p. 868.) Holding agencies to their stated goals in these instances is also consistent with our state law requirement that adjudicative or administrative decisions be based on findings supported by substantial evidence in the record. (*Topanga Assn. for a Scenic Community* v. *County of Los Angeles*, *supra*, 11 Cal.3d at pp. 515-516.) But it is another thing for courts to require that a complex, generally applicable piece of economic legislation that will have many effects on many different persons and entities accomplish precisely the goals stated in a legislative preamble in order to preserve its constitutionality. Rather, as discussed, such legislation may not be invalidated under the "substantially advance" prong of takings analysis unless it "constitutes an arbitrary regulation of property rights." (*Dolan*, *supra*, 512 U.S. at p. 391, fn. 8.) Thus, although we believe that SMB's complaint fails to state an inverse condemnation cause of action even under a heightened *Nollan/Dolan* type of standard, the complaint unquestionably fails under the more deferential takings standard appropriate for general legislation.

SMB cites *Chastleton Corporation* v. *Sinclair* (1924) 264 U.S. 543, 548, for the proposition that government dissatisfaction with high rents "is not in itself a justification" for rent control. In that case, the court considered whether an emergency wartime rent control statute should be extended beyond the emergency period, and concluded that a factual question had been presented that required further adjudication. But as one court has stated, "*Chastleton* is a *Lochner*[3]-era case the validity of which is questionable at best." (*Traweek* v. *City and County of San Francisco* (N.D. Cal. 1984) 659 F.Supp. 1012, 1028, fn. 30.) As we explained at considerable length in *Birkenfeld*, *supra*, 17 Cal.3d at pages 153-160, an emergency housing shortage, such as may exist during wartime, is not a constitutional requisite for rent control. The modern view is "that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare" (*Pennell*, *supra*, 485 U.S. at p. 13), irrespective of the existence of an emergency.

Our adoption of SMB's position would not only be inconsistent with constitutional precedent, but would create formidable practical problems as well. How long would a court, or a litigant, have to wait to give the law a "fair chance" to work before declaring that it is a failure and therefore unconstitutional? There is no answer to this question that would not be arbitrary and would not put courts in a distinctively legislative role.

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[3] The reference is to *Lochner* v. *New York* (1905) 198 U.S. 45, in which the court invalidated on due process grounds a law limiting the maximum hours bakers were permitted to work. This case has lent its name to the era in which the constitutional view the case typifies—invalidation of social and economic legislation on due process grounds if in the courts view there was insufficient justification for the law—prevailed. (See Tribe, *American Constitutional Law* (2d ed. 1988) § 8-4, pp. 570-573.)

That is not to say that a change in conditions may never justify the constitutional invalidation of a once valid law. But the circumstances for such invalidation are quite narrow. A quintessential example is presented by *Skalko* v. *City of Sunnyvale* (1939) 14 Cal.2d 213. In that case plaintiff's property was zoned for residential use. Since the time of the zoning ordinance's enactment, a large cannery had been built about 100 feet from the property. The cannery greatly increased automobile and truck traffic adjacent to the property and caused an infestation of the prune trees on the property by insects drawn to the cannery. After the city denied plaintiff's proposal that his lot be rezoned so that he could operate a cafeteria and refreshment stand, he sued for declaratory relief, claiming the zoning ordinance was invalid as applied to him. In upholding his position, this court stated: "Where conditions have changed since the legislative action was taken, 'statutes and ordinances which, after giving due weight to the new conditions, are found clearly enough not to conform to the Constitution, of course, must fall.'" (*Id.* at p. 216.) As the court concluded: "Certainly no one wants to live next door to a large factory, and the question whether a consideration of public health, peace, safety or general welfare justifies the continued restriction upon the appellant's property which prohibits its use for commercial purposes is not fairly debatable." (*Ibid.*)

Thus, in *Skalko*, the court found changing conditions rendered the application of a zoning ordinance to a particular piece of property arbitrary and irrational. There is no comparable allegation in SMB's complaint. Rather, SMB seeks to engage courts in the task of evaluating whether a piece of complex legislation has sufficiently measured up to its objectives to preserve its constitutional validity. Nothing in the United

States Supreme Court's recent jurisprudence indicates that it envisions such an activist role for the courts.[4]

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[4] To be sure, there are circumstances in which some greater degree of judicial scrutiny of legislative factfinding is appropriate. This has been the case, for example, when there are fundamental constitutional rights at stake that can be curtailed only when the state demonstrates a compelling interest under the strictest judicial scrutiny. (See *American Academy of Pediatrics* v. *Lungren* (1997) 16 Cal.4th 307, 341, 349-350 [greater scrutiny of legislative factfinding under the California Constitution's privacy clause for statute curbing the right to abortion]; *Turner Broadcasting System, Inc.* v. *FCC* (1994) 512 U.S. 622, 666 [recognizing that when First Amendment rights are implicated, "deference afforded to legislative findings does not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law"].) We have also recognized that some state constitutional provisions that impose very specific constraints on governmental power require for their enforcement a certain degree of judicial scrutiny of legislative factfinding. Thus, in *Professional Engineers* v. *Department of Transportation* (1997) 15 Cal.4th 543, 569-570, we considered Article VII of the California Constitution, which has been construed to restrict the state's authority to privately contract for state services, subject to limited exceptions, such as when such contracting would result in cost savings. (*Id.* at p. 550.) We upheld a trial court injunction against a certain form of private contracting by the Department of Transportation, in which the trial court had made a specific finding that no cost savings would result. We rejected a challenge to the injunction that relied on a statute passed subsequent to the injunction that asserted, without evident factual support, that the private contracting proscribed by the injunction would indeed result in cost savings. (*Id.* at pp. 572-574.)

(continued...)

In reversing the Court of Appeal, we again emphasize that we are not considering the question whether rent control is good policy but rather affirming the constitutional propriety of having the political process, through state and local legislative bodies, determine that policy. We note that the Legislature has already placed some limitation on rent control, enacting a statute restricting the capacity of localities to prevent landlords from charging the full market rent when a rental unit becomes vacant, and also preventing the imposition of rent control on certain types of units. (Civ. Code, §§ 1954.50-1954.53.) Thus, the legislative process has worked in a way that the blunt instrument of constitutional law generally cannot, crafting a political compromise that eliminates some of the perceived evils of rent control while preserving some of its benefits, i.e., to existing tenants.

(...continued)

The present case, regarding as it does the extent to which the government can regulate rent increases, does not involve the sort of fundamental right that is subject to the highest judicial scrutiny. (See *Pennell*, *supra*, 485 U.S. at p. 12.) Nor does it involve a constitutional provision construed to prohibit a certain type of government action absent specific factual findings, as was the case in *Professional Engineers*.

Moreover, as previously discussed, courts will scrutinize the *adjudicative* decisions of local legislative bodies on statutory and constitutional grounds to determine if their findings are supported by substantial evidence (*Topanga Assn. for a Scenic Community* v. *County of Los Angeles*, *supra*, 11 Cal.3d at pp. 515-516) or, in the case of certain development permit decisions, whether the exactions required are roughly proportional to a legitimate governmental interest. (*Dolan*, *supra*, 512 U.S. at p. 391). This type of scrutiny has generally not been applied to the *legislative* acts of local bodies. (See *Corona-Norco Unified School Dist.* v. *City of Corona*, *supra*, 17 Cal.App.4th at p. 992.)

In sum, with rent control, as with most other such social and economic legislation, we leave to legislative bodies rather than the courts to evaluate whether the legislation has fallen so far short of its goals as to warrant repeal or amendment. Courts, on the other hand, retain the constitutional role of invalidating certain features and applications of rent control law that have or will produce confiscatory results. (See *Kavanau*, *supra*, 16 Cal. 4th 761; *Birkenfeld*, *supra*, 17 Cal.3d at p. 169.) In the present case, SMB remains free to proceed with its administrative mandamus action alleging that the Board exceeded its legal authority under the charter amendment and that the Board's rulings deprived SMB of a fair return.

III. DISPOSITION

For all of the foregoing, we reverse the judgment of the Court of Appeal and remand with directions to reinstate the judgment of the trial court.

MOSK, J.

WE CONCUR: GEORGE, C.J.

KENNARD, J.

WERDEGAR, J.

CONCURRING OPINION BY KENNARD, J.

The United States Constitution requires the government to pay just compensation when private property is taken for public use. (U.S. Const., 5th Amend.) One test for determining whether a property regulation effects a taking, which the United States Supreme Court first articulated about twenty years ago, is the following: Government action affecting the use of private property is a taking requiring just compensation if the action does not "substantially advance" a legitimate government purpose. (*Agins* v. *City of Tiburon* (1980) 447 U.S. 255, 260.)

The "substantially advance" test is a means-end test: It requires that the property regulation in question—the means by which the government is acting—advance the end or purpose the government is seeking to achieve through the regulation. The question here is: How "substantially" must rent control, the regulation at issue here, "advance" the governmental purpose that justifies it? To answer this question, the majority opinion, in which I concur, uses what might be termed a "functional" approach, looking for guidance to cases judging the constitutionality of two functionally similar categories of regulation: price controls and general land use regulations. It concludes that rent control is valid unless it is an arbitrary regulation of property rights. (Maj. opn., *ante*, at p. 17.) I write separately to explain an additional basis for reaching this conclusion. An examination of the historical origins and development of the high court's "substantially advance" test shows that it originated outside of just compensation law in the realm of substantive due process and that, outside the narrow circumstances in which government exacts property as a condition of a development permit, the test is best understood as a rational relationship test.

I

As I have noted elsewhere, courts have long struggled with the difficult question of how to determine whether a

particular government action is a taking requiring compensation under the just compensation clause. (*Customer Co.* v. *City of Sacramento* (1995) 10 Cal.4th 368, 394 & fn. 1 (conc. opn. of Kennard, J.).) And as I mentioned at the outset here, in the past 20 years the United States Supreme Court has adopted the rule that government regulation of property is a taking if it fails to substantially advance a legitimate state interest.

The "substantially advance" test first entered just compensation law in 1980 in *Agins* v. *City of Tiburon*, *supra*, 447 U.S. 255, 260 (hereafter *Agins*). In that case, the United States Supreme Court stated: "The application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests, see *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 138, n. 36 (1978)." (*Ibid.*, italics added.) Two years earlier, the high court had foreshadowed this test by stating that "a use restriction on real property may constitute a 'taking' if not *reasonably necessary* to the effectuation of a substantial public purpose, see *Nectow* v. *Cambridge, supra*." (*Penn Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104, 127, italics added (hereafter *Penn Central*).)

More recently, in *Nollan* v. *California Coastal Comm'n* (1987) 483 U.S. 825 (hereafter *Nollan*) and *Dolan* v. *City of Tigard* (1994) 512 U.S. 374 (hereafter *Dolan*), the United States Supreme Court used the "substantially advance" language of *Agins* as the textual basis for developing unique requirements to be used in deciding whether an adjudicatively determined "exaction" of property as a condition of a property development permit was a taking. (Regulations affecting property can generally be classified as either legislative, if the restriction they impose applies to all property falling within a given class, or adjudicative, if the government through case-by-case

decisionmaking makes an individualized determination of what restriction to impose on each particular piece of property.)

Nollan and *Dolan* were cases in which property owners seeking development permits were adjudicatively required by the permitting authority to dedicate property easements to the government as a condition of a development permit. (*Dolan, supra*, 512 U.S. at pp. 379-380; *Nollan, supra*, 483 U.S. at p. 828.) The analysis in those cases began with the proposition that the development condition in question, if it had been imposed compulsorily by the government, would have been a taking requiring compensation. (*Dolan, supra*, 512 U.S. at p. 384 ["Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."]; *Nollan, supra*, 483 U.S. at p. 831 ["Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."].)

The exchange of development permission for exaction avoids being a per se taking only because technically it is voluntary. Some limit, however, is needed to ensure that the exchange is a fair one; otherwise, these exchanges would become a mechanism for the government to obtain property without paying for it—"'an out-and-out plan of extortion.'" (*Nollan, supra*, 483 U.S. at p. 837.) The *Nollan* and *Dolan* decisions attempted to ensure the fairness of the exchange by creating a special form of means-end testing. The *Nollan/Dolan* test authorizes exactions without compensation only if the exaction has a nexus to the harm the development will cause and is roughly proportional to the harm. (*Dolan, supra*, 512 U.S. at pp. 386, 391.)

Outside the *Nollan/Dolan* context, the United States Supreme Court has not yet had occasion to define how closely ends and means must be related for a government action to avoid being a taking. The rent control at issue here is outside the *Nollan/Dolan* context because it is a restriction on property use that is not imposed adjudicatively on only certain rental housing but instead is imposed legislatively on all rental housing in the municipality. Plaintiff landlord nonetheless seeks to have us extend the *Nollan/Dolan* test to rent control. In their dissents, Justices Chin and Baxter criticize the majority for rejecting that view, and they assert that the majority has inappropriately conflated due process analysis with takings analysis by adopting instead a "rational relationship" means-end test, a test commonly used in substantive due process analysis. Although the dissents' position is a plausible one if the words "substantially advance" are viewed in isolation, it collapses once the history of the "substantially advance" test is examined, for that test originated as a due process rational relationship test.

Before the United States Supreme Court's decisions in *Agins* and *Penn Central*, there had been no means-end test in just compensation law. As authority for applying a means-end test to determine whether there has been a taking, both cases cited *Nectow* v. *Cambridge* (1928) 277 U.S. 183 (hereafter *Nectow*). *Nectow*, however, was not a takings case in which the property owner sought just compensation, but a substantive due process case in which the property owner challenged a zoning ordinance as lacking any rational relationship to the public welfare and sought invalidation of the ordinance. To understand the connection between the substantive due process means-end test used in *Nectow* and the United States Supreme Court's recent application of that test in just compensation law, it is necessary to examine the history of the high court's development of substantive due process means-end review.

II

The United States Supreme Court in the late 19th and early 20th century was developing as one aspect of substantive due process its view—applicable to all exercises of state power depriving someone of life, liberty, or property—that due process required some reasonable relationship between the means chosen by government and the ends it seeks to achieve. As I noted earlier, the high court's 1928 decision in *Nectow, supra*, 277 U.S. 183, sets forth a substantive due process means-end test. That test has its origins in *Mugler* v. *Kansas* (1887) 123 U.S. 623, 661, a case upholding a state's prohibition statute that rendered a brewery valueless. *Mugler* formulated the general substantive due process test of state action as follows: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no *real or substantial relation* to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." (*Ibid.*, italics added.) The high court repeated the "substantial relation" requirement in later substantive due process decisions in which the plaintiff challenged the validity of various forms of state regulation. (See, e.g., *Igerman Alliance Ins. Co.* v. *Hale* (1911) 219 U.S. 307, 316 [regulation of fire insurance]; *Jacobson* v. *Commonwealth of Massachusetts* (1905) 197 U.S. 11, 31 [mandatory vaccination legislation]; *Booth* v. *Illinois* (1902) 184 U.S. 425, 429 [prohibition of grain option contracts]; *Powell* v. *Pennsylvania* (1888) 127 U.S. 678, 684 [regulation of oleomargarine].)

The United States Supreme Court used this substantive due process means-ends test, and the "substantial relation" language, to determine the validity of zoning regulations in due process cases, including *Nectow*, in which a property owner contended that the regulations were unreasonable and therefore invalid but made no claim that the regulations were a taking requiring just compensation. (*Cusack Co.* v. *Chicago* (1917)

242 U.S. 526, 531; *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, 395; *Goreib* v. *Fox* (1927) 274 U.S. 603, 610; *Nectow*, *supra*, 277 U.S. 183, 188.) In perhaps the most famous of these early zoning cases, *Euclid* v. *Ambler Co.* (hereafter *Euclid*), the court stated: "[B]efore the ordinance can be declared unconstitutional [under the due process clause], [it must be found] that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Euclid*, *supra*, 272 U.S. at p. 395.) *Euclid* thus equates a regulation that has "no substantial relation" to its ends with one that is "arbitrary and unreasonable" and therefore fails to satisfy the requirements of substantive due process. The portion of *Nectow* that *Agins* came to rely on many years later was a restatement of *Euclid's* substantive due process means-end test: "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Euclid* v. *Ambler Co.*, *supra*, p. 395." (*Nectow*, *supra*, 277 U.S. at p. 188.)

III

Means-end testing has remained a cornerstone of substantive due process since the high court's 1928 decision in *Nectow*. In cases after *Nectow*, the court continued to use *Nectow's* formulation as a general test of substantive due process review. In *Nebbia* v. *New York* (1934) 291 U.S. 502, 525, a price control case upholding price controls on milk, the court observed: "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable,

arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[1]

Nectow, and its predecessor *Euclid*, have continued to be understood as due process means-end relationship cases; more specifically, they have been consistently viewed as cases applying a rational relationship standard of due process review. (*Nashville, C. & St. L. Ry.* v. *Walters* (1935) 294 U.S. 405, 415 [describing *Nectow* as holding that "[t]he police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably" (fn. omitted)]; *Arlington Heights* v. *Metropolitan Housing Corp.* (1977) 429 U.S. 252, 263 [describing *Nectow* as recognizing a "right to be free of arbitrary or irrational zoning actions"]; *Moore* v. *East Cleveland* (1977) 431 U.S. 494, 498, fn. 6 (plur. opn.) ["*Euclid* held that land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.' 272 U.S., at 395. See *Nectow* v. *Cambridge*, 277 U.S. 183, 188

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[1] Justice Chin's dissent perceives a conflict in meaning between the "substantially advance" test that *Agins* adopted from *Nectow* and the rational relationship test of *Nebbia* v. *New York*, *supra*, 291 U.S. 502. The conflict vanishes, however, when the historical origins of the "substantially advance" test are taken into account. Both tests spring from the same root of substantive due process means-end review and are almost identically phrased in *Nectow* and *Nebbia*. (Compare *Nectow*, *supra*, 277 U.S. 183, 187-188 [due process requires that challenged law not be "'a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense'"] with *Nebbia* v. *New York*, *supra*, 291 U.S. at p. 525 [due process requires that "the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained"].)

(1928). . . . [O]ur cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose."].)

In 1980, the high court in *Agins* imported the substantive due process means-end test of *Nectow* into just compensation law. Citing *Nectow*, the *Agins* court stated that a zoning law that did not "substantially advance legitimate state interests" was a taking requiring just compensation. (*Agins, supra*, 447 U.S. at p. 260; see also *Penn Central, supra*, 438 U.S. at p. 127 ["[A] use restriction on real property may constitute a 'taking' if not *reasonably necessary* to the effectuation of a substantial public purpose, see *Nectow v. Cambridge, supra*, . . ." (Italics added.)].)

Agins applied as a rational relationship test the "substantially advance" test it derived from *Nectow*. In *Agins*, the State of California had a policy requiring cities to develop open space plans; in response, a city enacted an ordinance limiting use of the five-acre property in question to residential housing at a density of one house per acre. *Agins* concluded with little difficulty and without a searching examination that the ordinance substantially advanced the legitimate government goal of reducing the "ill effects of urbanization" (*Agins, supra*, 447 U.S. 255, 261); to demonstrate that the advancement would be substantial the court relied on the following: "The State of California has determined that the development of local open-space plans will discourage the 'premature and unnecessary conversion of open-space land to urban uses.'" (*Ibid.*) A legislative conclusion made at the state level that as a statewide matter open space planning will in general discourage urbanization may show that there is a rational relationship between the particular zoning restrictions imposed on the parcel at issue and the goal of "protect[ing] the residents of [the city] from the ill effects of urbanization" (*ibid.*), but does not establish any stronger connection than that between those ends and means.

In *Schad* v. *Borough of Mt. Ephraim* (1981) 452 U.S. 61, 68, the high court made clear that the *Agins* "substantially advance" requirement is a rational relationship test: "Where property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is *rationally related* to legitimate state concerns and does not deprive the owner of economically viable use of his property. *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). But an ordinance may fail even under that limited standard of review. *Moore* v. *East Cleveland*, *supra*, at 520 (Stevens, J., concurring in judgment); *Nectow* v. *Cambridge*, 277 U.S. 183 (1928)." (Italics added.)

Even apart from this historical understanding of the "substantially advance" test as a rational relationship test, plaintiff here has failed to give persuasive reasons for extending the heightened scrutiny of *Nollan* and *Dolan* to other forms of land use regulation, like the rent control at issue here, in which the government does not make an adjudicative decision to exact property as a condition of a development permit. There is good reason for using heightened means-end scrutiny in the *Nollan/Dolan* context because of the danger of government engaging in extortion by permit. But outside of that context, there is no clear justification for it as a general requirement of just compensation law. (See *Erlich* v. *City of Culver City* (1996) 12 Cal.4th 854, 903, 906-907 (conc. and dis. opn. of Kennard, J.) [noting that *Nollan* and *Dolan* were limited to exactions of property adjudicatively imposed as a condition of development].)

IV

As I have explained, outside the *Nollan/Dolan* context, I would adhere to the historical understanding of the "substantially advance" test as a rational relationship test. Nonetheless, as the differing positions held by members of this

court in this case show, there are grounds for reasonable debate as to the meaning of that test in just compensation law outside the *Nollan/Dolan* context. Does it require only a rational relationship between the regulation and its purpose? Or a closer connection between means and ends, adapted from the *Nollan/Dolan* test? Or some other degree of connection between means and ends? I urge the high court to resolve this uncertainty.

This also raises a more fundamental question: Outside the *Nollan/Dolan* context, is a means-end test an appropriate measure of whether a regulatory taking has occurred? Means-end tests measure the degree to which the property regulation in question advances the purpose the government is seeking to achieve through the regulation. It may be questioned whether the existence of a taking should depend on how well it advances the government's purpose for invading the property owner's interests. To the property owner, the loss is the same whatever the degree to which it advances the government's purpose. And although means-end testing can be used as an argument for expanding the right to compensation, as plaintiff does here, it could also restrict the right to compensation, for it suggests that if the regulation greatly advances the government's purpose, then no taking has occurred even if the invasion of the property owner's interest is also very great.

I note that recently Justice Kennedy of the United States Supreme Court has questioned the appropriateness of using a means-end test as the measure of whether a taking has occurred. (*Eastern Enterprises* v. *Apfel* (1998) ___ U.S. ___ [118 S.Ct. 2131, 2157] (conc. and dis. opn. of Kennedy, J.) ["The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. See, *e.g.*, *Agins v. City of Tiburon*, 447 U.S., at 260 . . . (zoning constitutes a taking if it does not 'substantially advance legitimate state interests'). This sort of analysis is in uneasy tension with our basic understanding of the

Takings Clause, which has not been understood to be a substantive or absolute limit on Government's power to act. The Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge. . . . [¶] . . . [T]he more appropriate constitutional analysis [of the legitimacy of a legislative judgment that the means chosen will advance the government's purpose] arises under general due process principles rather than under the Takings Clause."]; see also *id.* at p. 2161 (dis. opn. of Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ.) ["at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property'" (italics original)]; *First Lutheran Church* v. *Los Angeles County* (1987) 482 U.S. 304, 315 [purpose of just compensation clause is "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking" (italics original)].)

Commentators have likewise questioned the high court's incorporation of due process means-end testing in just compensation law. (Echeverria & Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion* (1993) 17 Vt. L.Rev. 695.) Outside the *Nollan/Dolan* context, should a means-end test be used to determine whether a taking has occurred, or instead should means-end testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of the law, I respectfully suggest that it do so when the opportunity next arises.

KENNARD, J.

DISSENTING OPINION BY BAXTER, J.

I respectfully dissent.

The majority err in holding that the complaint in this case does not state a cause of action for inverse condemnation. The error results in part from the mistaken notion that the separation of powers doctrine somehow precludes the plaintiff from introducing evidence in support of its takings clause claim that the stated purpose of the Santa Monica rent control ordinance[1] has not been substantially advanced over time. In the end, the majority refuse to direct the court below to carry out its constitutionally mandated judicial obligation to determine, on the basis of evidence to be presented, whether application of the Santa Monica ordinance has taken property from plaintiff without just compensation.

In so doing, the majority address the wrong question, arrive at the wrong answer, and fail to differentiate between the distinct judicial roles of assessing the validity of the ordinance against a claim that it violates substantive due process and in determining whether the impact of the ordinance constitutes a taking of private property for which just compensation must be paid. In short, I agree wholeheartedly with Justice Chin's conclusion that the majority "inappropriately conflates takings jurisprudence with due process jurisprudence." As a result they not only deny plaintiff the opportunity to present evidence necessary to support its inverse condemnation claim, but also leave California takings jurisprudence in a state of confusion.

A statute may be a proper exercise of the police power and yet create a taking for which just compensation must be paid under the takings clause of the Fifth Amendment to the United

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[1] Rent control in Santa Monica is imposed under article XVIII, an amendment to the Santa Monica City Charter. Because article XVIII has the effect of a city ordinance, that term is used here for convenience.

States Constitution.[2] Although deference is accorded legislative judgment when a statute is challenged as exceeding the permissible scope of the police power, no question of deference or, as stated otherwise by the majority, level of judicial scrutiny arises when just compensation is sought under the takings clause, because a takings claim presents "'essentially ad hoc, factual inquiries.'" (*Hodel* v. *Virginia Surface Mining & Recl. Assn.* (1981) 452 U.S. 264, 295-296; *Kaiser Aetna* v. *United States* (1979) 444 U.S. 164, 175.)

The Supreme Court has consistently recognized the distinct nature of the due process and takings clause inquiries. "[H]owever 'rational' the exercise of the [police] power may be, that inquiry is quite separate from the question of whether the enactment takes property within the prohibition of the Fifth Amendment." (*United States* v. *Security Industrial Bank* (1982) 459 U.S. 70, 75; see also *Eastern Enterprises* v. *Apfel* (1998) __ U.S. __ [118 S.Ct. 2131, 2161, 141 L.Ed.2d 451] (dis. opn. of Breyer, J.) [The takings clause "refers to the taking of 'private property . . . for public use without just compensation.' U.S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public good.' "].)

Failure to recognize this distinction fuels the majority's effort to ascertain what deference to accord to, or the level of judicial scrutiny to apply to, the Santa Monica rent control ordinance. That effort is misguided, for, as I explain below, the

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[2] As relevant here, the Fifth Amendment provides that no person shall "be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." The latter provision is commonly referred to as the "takings clause."

question of deference and/or level of judicial scrutiny simply does not arise in this takings clause claim.

As also will be discussed at greater length below, the majority's reasoning rests on a series of faulty premises:

(1) That plaintiff seeks to invalidate the Santa Monica rent control ordinance. It does not. The complaint seeks a declaration that the ordinance effects an uncompensated taking of plaintiff's property rights and seeks monetary compensation for the taking. If a taking is found, compensation is due even if the ordinance is valid.

(2) That recognizing a right to just compensation because the ordinance does not substantially advance its stated purpose would constitute a judicial repeal of the ordinance. Recognition that the imposition of rent controls on plaintiff's property is a taking and awarding compensation therefor would not repeal the ordinance. It would instead constitute a proper exercise of a judicial power recognized since the decision of *Marbury* v. *Madison* (1803) 5 U.S. (1 Cranch) 137 – the power to construe, apply, and enforce rights guaranteed to all citizens by the United States Constitution.

(3) That a takings clause claim for inverse condemnation may be rejected because the rent control ordinance has a rational basis and is not arbitrary and discriminatory. As Justice Chin observes, a takings clause claim for just compensation may not be rejected on that ground, which is an aspect of due process, not takings, analysis. Here, too, the majority address the wrong question and give the wrong answer. The takings clause has different and more stringent criteria than those applied under the majority's attempt to morph the deferential due process rational basis test into a takings clause test.

Moreover, whether at the time the Santa Monica rent control ordinance was enacted in April 1979 it was reasonable for the enacting body to believe that the ordinance would substantially advance the legislative purpose is not the question

posed by this 1995 complaint. The question is whether at the time the complaint was filed in 1995, after 16 years of implementation, the ordinance had, in fact, substantially advanced its stated purpose.

(4) That the "substantially advance" test enunciated by the United States Supreme Court need not be applied to the stated legislative purpose underlying the ordinance if the ordinance may advance some other, unstated, purpose. Again, the majority err in suggesting that the court may sanction the uncompensated taking brought about by the imposition of rent control if the Santa Monica ordinance substantially advances *any* government purpose the court imagines may have justified the regulation if the legislative body had thought of that purpose.

Once the faulty assumptions underlying the majority's reasoning are eliminated and the issues actually raised in this case identified, it is apparent that the holding of the majority lacks a foundation in takings clause jurisprudence. The complaint does state a cause of action for inverse condemnation on plaintiff's theory that the ordinance has not substantially advanced and does not presently substantially advance the purpose offered in justification for abridgment of the rights of the owners of rental properties.

The complaint also states facts sufficient to demonstrate plaintiff's entitlement to compensation on a second theory—the ordinance goes "too far" both on its face and as applied to plaintiff's property. In order to provide a stock of rental housing affordable to persons with low incomes, young families, minorities, and the elderly, as well as other Santa Monica renters, plaintiff and all owners of Santa Monica rental property are compelled to bear a burden—subsidizing rentals—that in fairness and justice should be borne by the general public. That being so, just compensation must be paid to the owners of rental properties to which the ordinance is applied.

The Court of Appeal recognized that the tests enunciated in *Agins* v. *Tiburon* (1980) 477 U.S. 255, 260 (*Agins*) and *Penn Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104 125-127 (*Penn Central*) are still the measure by which a court determines if a property restriction goes too far and thus constitutes a compensable taking. The court then held that the complaint in this action states facts which, if proven, would show that the Santa Monica ordinance does go too far and thus constitutes a compensable taking. Under article VI, section 12, subdivision (b), of the California Constitution this court reviews decisions of the Court of Appeal, but nowhere in the majority opinion do we find a review of this holding or the analysis which supports it.[3]

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[3] The complaint states a cause of action on a third ground – the Santa Monica rent control ordinance is not a valid exercise of the police power. There is no legitimate governmental interest in granting rent subsidies, through rent control, to tenants able to afford market rate rentals.

Although this is not a theory of relief identified by plaintiff in its complaint, the law is well settled that a complaint must be upheld against a demurrer if it states a cause of action on *any* theory. (*American Airlines, Inc.* v. *County of San Mateo* (1996) 12 Cal.4th 1110, 1118; *Alliance Mortgage Co.* v. *Rothwell* (1995) 10 Cal.4th 1226, 1232.) This is true whether or not the plaintiff has correctly identified the legal theory on which relief is available. (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 905, p. 366.)

Nonetheless, since plaintiff has limited its challenge to one under the takings clause, I shall not pursue this theory further than to comment that the demographics of Santa Monica suggest that the benefits of rent control flow directly to persons who are able to afford market rate rents. Presently the median family income in Santa Monica is $51,085, and the per capita

(continued...)

No one can reasonably dispute that ensuring the availability of affordable housing for persons unable to pay market rate rents for clean, safe, and suitable housing is not only a proper, but also a laudable governmental purpose. However, the means by which a governmental entity achieves that purpose is circumscribed by not only the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, but also the takings clause of the Fifth Amendment which mandates that just compensation be paid when the government takes a private property right. My reasons for concluding that the complaint states a cause of action and that the judgment of the Court of Appeal should be affirmed follow in greater detail below.

I

The Inverse Condemnation Complaint

This mandamus action arises out of a ruling by the Los Angeles County Superior Court sustaining the demurrer of the Santa Monica Rent Control Board to a complaint in inverse condemnation seeking to recover "just compensation" from the board for a "taking" of plaintiff's property through application of the city's rent control ordinance.

In ruling on the sufficiency of a complaint to withstand a demurrer, i.e., to state a cause of action, the court assumes the

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income of its residents is $29,134. More than 19 percent of households have income of $75,000 or more and over 15 percent of households have income between $50,000 to $74,999. Forty-three percent of residents over 25 years of age have bachelor's degrees or higher. In 1989 only 5.7 percent of families and 9.1 percent of persons over 65 years of age had incomes below the poverty level. Only 4.8 percent of households received public assistance. (U.S. Bureau of the Census, County and City Data Book: 1994, pp. 690-691.)

truth of all well-pleaded allegations. (*Lazer* v. *Superior Court* (1996) 12 Cal.4th 631, 635.) The ability of the plaintiff to prove the allegations is irrelevant at this stage of the proceedings. We must, therefore, accept as true plaintiff's allegations. Briefly restated, the complaint alleges the following:

Santa Monica Beach, Ltd., owns a 12-unit apartment building on Sixth Street in Santa Monica. Rental of those units is subject to the provisions of a rent control ordinance that has been in effect since 1979 when it was adopted as part of article XVIII, in an amendment to the Santa Monica City Charter. Pursuant to the rent control ordinance a rent board establishes maximum allowable rents, provides for annual general adjustments, and may permit individual adjustments of allowable rents. Leave of the board, which may only be granted if a property subject to the ordinance does not produce a fair rate of return, is necessary before a controlled property may be removed from the rental market by demolition, conversion, or any other means. Eviction of a tenant is permissible only if the tenant fails to pay rent, violates a covenant of tenancy other than one requiring surrender of the property, causes a nuisance or substantial damage, uses or permits use of the unit for unlawful purposes, has refused at the termination of a tenancy to execute a written extension, denies reasonable access to the landlord, at the end of a tenancy the person in possession is a subtenant not approved by the landlord, or the unit is to be occupied by a close relative of the landlord.

Article XVIII, section 1800, constitutes the "Statement of Purpose" of the rent control ordinance, stating in pertinent part, and as amended in 1984:

"A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further

rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return.

". . . . . .

"Through this Article, the city exercises its police power in order to address the serious housing problem recognized in the original enactment of this Rent Control Law in 1979 and still existing in 1984. The 1984 Amendment to the Rent Control Law is . . . intended to enable the Board to provide relief to persons facing particular hardship and to protect and increase the supply of affordable housing in the city. Termination or erosion of the protections of this Article would have serious disruptive consequences for persons in need of protection and the supply of affordable housing in the city."

The rent board denied plaintiff's March 27, 1992, application for a rent adjustment and on a subsequent March 30, 1993, application granted an increase of $3 per unit and temporary rent increases averaging $58 per month.[4]

A fair reading of those allegations of the complaint and the rent control ordinance is that, but for the limits imposed under the rent control ordinance, plaintiff could receive higher, market rate, rents for its apartments.

The complaint next contends that the rent control ordinance violates plaintiff's rights under the taking clause of the Fifth and Fourteenth Amendments to the United States

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[4] Plaintiff has challenged that action in a petition for writ of (administrative) mandamus joined with the instant complaint for inverse condemnation that is still pending in the superior court.

Constitution and article I, section 19 of the California Constitution[5] because it fails to substantially advance a legitimate governmental interest. It fails because application of the ordinance has reduced the availability of private rental housing in Santa Monica and has made it more difficult for low-income renters, young families, and the elderly to find affordable rental housing.

From 1980 to the end of the decade, under rent control, the number of low-income renter households decreased by 775, or 12 percent, while the number increased in every comparable city in Southern California that did not have rent control. The number of very-low-income households decreased by 285 during the decade. At the same time very-high-income households increased by 37 percent, although their number dropped in Los Angeles County as a whole.

During the decade of the 80's, the number of family households with children in Santa Monica fell by 1,299, a 6 percent decline, while there was no loss in comparable cities in

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[5] California Constitution, article I, section 19, provides in pertinent part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

The Fifth Amendment is applicable to the states through incorporation into the Fourteenth Amendment. (*Webb's Fabulous Pharmacies, Inc.* v. *Beckwith* (1980) 449 U.S. 155, 160; *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago* (1897) 166 U.S. 226, 239.) While article I, section 19 of the California Constitution protects a broader range of property rights than does the Fifth Amendment (*Hensler* v. *City of Glendale* (1994) 8 Cal.4th 1, 9, fn. 4; *Varjabedian* v. *City of Madera* (1977) 20 Cal.3d 285, 298), it does not do so with respect to rent control legislation. For ease of reference, therefore, I refer only to the takings clause or Fifth Amendment.

Southern California without rent control. Female-headed households with children under 18 fell by 593, a 27 percent decrease, while the number increased in Los Angeles County as a whole.

The population of elderly in Santa Monica declined by 1.7 percent during the decade, while during the same period it increased in Los Angeles County by more than 15 percent, and it increased in comparable cities without rent control in Southern California.

Plaintiff asserted, on this basis, that denial of its application for a rent adjustment did not substantially advance a legitimate governmental interest and there was not a close nexus between the denial of the application for a fair rate of return on its capital investment and any public harm that might result from unregulated operation of the property. Unregulated use of the property would not have resulted in the problems Santa Monica sought to address through adoption of the rent control ordinance.

Plaintiff also alleged that even if the ordinance does substantially advance a proper governmental purpose, denial of its application seeking a fair rate of return had the effect of making application of the ordinance to its property "confiscatory." Moreover, the ordinance has denied petitioner essential attributes of ownership of the property, including the right to exclude others and the right to determine the terms on which leasehold interests in plaintiff's property will be alienated.

Arguing that for all of the above reasons the rent control board's application of the ordinance to its property comprises a regulatory taking for public use without just compensation, plaintiff sought a trial at which it could offer evidence in support of its claims.

Plaintiff's inverse condemnation claim thus rested on three different theories under any of which it was entitled to just compensation for the regulatory taking of its right to unregulated use of its rental units:

1. After a decade of implementation the Santa Monica rent control ordinance not only failed to substantially advance the stated governmental purpose, it made the problem it sought to address worse. Under this theory, application of the ordinance to any property for which higher rent could be obtained absent regulation would constitute a taking for a public purpose for which just compensation must be paid.

2. Application of the ordinance to plaintiff's property did not substantially advance the stated governmental purpose because there was no basis for concluding that unregulated rental of plaintiff's apartments would contribute to the shortage of affordable rental units in Santa Monica. Therefore, plaintiff's property has been taken for a public purpose and plaintiff is entitled to just compensation for the taking.

3. Because the rent adjustments allowed plaintiff by the board did not ensure a fair rate of return on investment, application of the ordinance to plaintiff's property was confiscatory. This claim is not presently before the court. It should be resolved in the pending administrative mandamus action.

The superior court did not consider whether the ordinance on its face created a constitutionally impermissible taking without just compensation, but ruled that the complaint failed to state a cause of action for inverse condemnation on plaintiff's theories. The superior court rejected plaintiff's argument that *Nollan* v. *California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*), in which the court applied the substantially advance test in finding a regulatory taking, mandated a heightened standard of review, and ruled that the appropriate standard of review was the "rational basis" standard. Thus, it impliedly concluded that plaintiff could not prevail because the city had a rational basis for finding that the public health and welfare, and particularly that of the identified groups, was endangered by unregulated rents and that the ordinance would prevent or minimize the threatened harm.

The Court of Appeal, reviewing the superior court order on petition for writ of mandate, disagreed with that reasoning and ordered that a peremptory writ of mandate issue commanding the superior court to set aside its order and overrule the board's demurrer. The Court of Appeal reasoned that the question raised by the complaint was whether continued application of the ordinance to plaintiff's property constituted a compensable taking for a public purpose because absent just compensation, in the words of the United States Supreme Court, "it went too far" to be a constitutionally permissible interference with plaintiff's rights as an owner of property. That question could not be resolved on demurrer. The Court of Appeal also recognized that *Nollan, supra*, 483 U.S. at page 834, footnote 3, had expressly rejected application of the rational basis test in takings cases, stating: "To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980), not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective.'" (Original italics.)

Although whether *on its face* this ordinance exceeds the permissible scope of the police power could be resolved by the court without taking evidence, the question posed by plaintiff in the complaint is whether over time the ordinance has substantially advanced the legislative purpose. This question cannot be decided on demurrer. If plaintiff can prove that the rent control ordinance has not substantially advanced its purpose, or that application of the ordinance to its property does not substantially advance the purpose, the "compensable taking" element of a cause of action for inverse condemnation would be established. This is true notwithstanding that the City may be able to show that there was a rational basis for the law when it was adopted.

II

Price Control and Zoning

In their misguided attempt to identify a level of judicial scrutiny that will satisfy the takings clause, the majority suggest that price controls and zoning legislation are sufficiently analogous to rent control to warrant placement of these types of government action in a continuum of levels of judicial scrutiny. Again, they err. The price control and zoning standards to which they look are those developed in due process challenges to the validity of legislation, not takings clause claims for just compensation because property has been subjected to those laws. The level of judicial scrutiny accorded legislation subjected to due process challenges is irrelevant in a taking clause claim.

That regulation of prices other than rents is a proper exercise of the police power is well established. This was recognized by the Supreme Court more than a century ago in *Munn* v. *Illinois* (1876) 94 U.S. 113, 124. The validity of an Illinois statute fixing the maximum charge for storage of grain in private warehouses was in issue. It was argued that the restrictions took property without due process of law. There, speaking for the court, Chief Justice Waite explained the due process source of authority for the statute:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power on the whole people to control rights which are purely and exclusively private, [citation]; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own

property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source comes the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, & c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820 conferred power upon the city of Washington 'to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread,' [citation]; and, in 1848, 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers,' [citation].

"From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation." (94 U.S. at pp. 124-125.)

The court recognized in *Munn* v. *Illinois*, *supra*, 94 U.S. 113, that it is necessary to understand the principles underlying exercise of the police power in order to determine when the power is exercised in a constitutionally permissible manner, and explained that when property is affected with a public interest the property is no longer wholly private. "When, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." (*Id.* at p. 126.)

The court addressed exercise of the police power to regulate prices again in *Nebbia* v. *New York* (1934) 291 U.S. 502, 525: "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. . . . [¶] . . . [¶] The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interest of the community." (Fns. omitted.)

After an exhaustive survey of the areas of private rights theretofore held to be subject to regulation under the police power, the court turned to the New York statute before it, a law which fixed minimum prices for milk. The court found a proper governmental purpose–preventing demoralizing competitive conditions and unfair trade practices which reduced the income of producers below the cost of production. It then rejected an

argument that price control was per se unreasonable and unconstitutional except as to business affected with a public interest, i.e., one in which the property is devoted to a purpose which the public as such might undertake, or one dependent on a public grant or franchise, or is bound to serve all comers – public utilities and/or monopolies. "The due process clause makes no mention of sales or of prices any more than it speaks of business or contracts or buildings or other incidents of property. The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. *Munn* v. *Illinois*, 94 U.S. 113." (291 U.S. at p. 532.)

Retreating from the language in *Munn* which suggested that regulation of prices was justified only when the property had been devoted to a public use, the court held: "The statement that one has dedicated his property to a public use is . . . merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue." (*Nebbia* v. *New York*, *supra*, 291 U.S. at p. 534.) "[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells. [¶] So far as the requirement of due process is concerned, and *in the absence of other constitutional restriction*, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus*

officio. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.'" (*Nebbia* v. *New York*, *supra*, 291 U.S. at p. 537; italics added.) "The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." (*Id.* at pp. 538-539.)

This continues to be the rule insofar as price controls in general are concerned. As the court acknowledged in *Nebbia* v. *New York*, *supra*, 291 U.S. 502, 537, however, it is so only "in the absence of other constitutional restriction." The takings clause is another constitutional restriction. A law restricting property rights may be valid as a proper exercise of the police power, but nonetheless violate the takings clause unless just compensation is paid by the government for the diminution of those rights.

Zoning laws, too, have long been upheld under the deferential, rational basis, level of judicial scrutiny applied in due process based challenges to economic and social legislation. Before a general zoning ordinance will be declared unconstitutional the court must conclude that the law is "'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" (*Eastlake* v. *Forest City Enterprises, Inc.* (1976) 426 U.S. 668, 676; *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, 394; see also *Consolidated Rock Products Co.* v. *City of Los Angeles* (1962) 57 Cal.2d 515, 522-523.)

There is no comparable level of judicial scrutiny when it is claimed that a zoning law takes property for which compensation must be paid, however. This is so because

determining whether a zoning law brings about a compensable taking can be determined only after considering a variety of evidentiary factors. (*Lucas* v. *South Carolina Coastal Council* (1992) 505 U.S. 1003, 1030-1031; *Hansen Brothers Enterprises, Inc.* v. *Board of Supervisors* (1996) 12 Cal.4th 533, 531.) As this court recognized in *Landgate, Inc.* v. *California Coastal Com.* (1998) 17 Cal.4th 1006, 1016-1017, unless a takings claim is based on denial of all beneficial use or physical invasion of the property, whether a compensable taking exists requires a "case-specific inquiry."

III

Rent Control and the Takings Clause

The majority proceed on an assumption that it has also been settled that rent control does not bring about a compensable taking. Again they err. Neither the United States Supreme Court nor this court has held in a takings clause challenge that a rent control law like the Santa Monica ordinance is constitutionally permissible absent payment of just compensation. The United States Supreme Court has upheld rent control as an exercise of Congress's war powers or to confront an emergency arising during or out of a world war. Neither the Supreme Court nor this court has ever applied contemporary takings clause jurisprudence to a peacetime rent control law of indefinite duration enacted simply to address a problem created by rising rents.

The analytical focus in assessing whether rent control constitutes a taking for which the takings clause mandates just compensation must be directed to the means by which rent control accomplishes its purpose. Rent control differs from and cannot be equated to other forms of price control because it encroaches on property rights in ways that price control does not. The Santa Monica rent control ordinance takes from the property owner the right to charge market rent for the owner's property and by so doing compels the owner to subsidize the tenant.

Price control creates no comparable direct transfer of a property interest to a third person. The ordinance in question depresses the value of the rent-controlled property. Unlike property used to manufacture price-controlled items, rental housing cannot easily be used for other purposes and the Santa Monica ordinance severely limits the ability of the owner to go out of the rental housing business. Finally, the ordinance tranfers to the tenant the right to occupy the property for an indefinite period. Again, none of this is true of other forms of price control. Thus we cannot assume that decisions upholding other forms of price control are authority for rejecting a takings clause challenge to a rent control ordinance.

The Supreme Court first addressed takings clause challenges to the validity of rent control laws enacted as federal wartime emergency legislation. (See *Block* v. *Hirsh* (1921) 256 U.S. 135 (*Block*); *Woods* v. *Miller Co.* (1948) 333 U.S. 138 (*Woods*); *Bowles* v. *Willingham* (1944) 321 U.S. 503 (*Bowles*).) None of those decisions upheld application of rent control without payment of just compensation in a challenge such as that made here.

Block, the first of the decisions which are sometimes relied on in support of the proposition that rent control is constitutionally permissible, addressed the claim of a Washington, D.C., property owner that the Act of October 22, 1919 (41 Stat. 297, 301) was a constitutionally invalid attempt to authorize the taking of property not for public use and without due process of law insofar as it permitted a lessee to refuse to surrender the premises on expiration of the lease. The law, which was to expire in two years unless sooner repealed, gave the owner the right to retake the property for his own occupancy on thirty days' notice, but the owner had not given that notice before seeking to recover possession. The statute included a declaration that the restrictions were made necessary "by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and

burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business." (256 U.S. at p. 154.) The court noted that "Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed . . . ." (*Id.* at pp. 154-155.)

The Supreme Court concluded that the circumstances were such as to clothe the rental of buildings in the District of Columbia with a public interest great enough to justify regulation, noting, however, that what may create that interest at one time may at others be purely a matter of private concern. At the time of this legislation, a "public exigency" justified "restricting property rights to a certain extent without compensation." (*Block*, *supra*, 256 U.S. at p. 156.)

The court then considered whether the statute went "too far," recognizing that "just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law. *Martin* v. *District of Columbia*, 205 U.S. 135." (*Block*, *supra*, 256 U.S. at p. 156.) The court did not have to draw that line, however, as "[t]he regulation is put and justified only as a temporary measure. [Citations.] A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." (*Id.* at p. 157.)

The high court next considered a challenge to rent control in the District of Columbia in *Chastleton Corp.* v. *Sinclair* (1924) 264 U.S. 543. The plaintiff sought to restrain enforcement of a rent commission order reducing rents under the authority of a 1921 law declaring that the emergency still existed and purporting to continue the law upheld in *Block*. The court, impliedly accepting the plaintiff's theory that if the emergency had ended the restriction would violate the takings clause, remanded the case to the District of Columbia courts for an evidentiary hearing to determine whether conditions had

changed stating that "[I]f about all that remains of war conditions is the *increased cost of living, that is not in itself a justification* of the act." (264 U.S. at p. 548, italics added.)

Subsequently, in *New State Ice Co.* v. *Liebmann* (1932) 285 U.S. 262, 277, the court again emphasized that rents may not be subjected to legislative regulation "except as to temporary measures to tide over grave emergencies." (See also *Tyson & Brother* v. *Banton* (1927) 273 U.S. 418 ["[T]he business of renting houses and apartments is not so affected with a public interest as to justify legislative fixing of prices unless some great emergency exists. *Block* v. *Hirsh, supra*, p. 157; *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, 548. And even with the emergency, the statutes 'went to the verge of the law.'"].)

During the Second World War, in *Bowles*, the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C. App. (Supp.II) § 901) was challenged as a constitutionally impermissible delegation of legislative authority and as a deprivation of property without due process. Congress had expressly invoked its war powers as authority for the legislation and that power was not challenged. The court concluded that the standards for fixing rents were sufficiently definite and accorded property owners due process, relying in part on *Block*. The court also stated: "Moreover, there would be no constitutional objection if Congress as a war emergency measure had itself fixed the maximum rents in these areas. We are not dealing here with a situation which involves a 'taking' of property. *Wilson* v. *Brown, supra*.[6] By § 4 (d) of the Act it is provided that

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[6] *Wilson* v. *Brown* (1943) 137 F.2d 348, rejected a challenge to rent ceilings imposed in Chicago pursuant to the Emergency Price Control Act. The property owner complained that the rent adjustments permitted did not produce a fair return on investment. The court questioned any analogy between the due process requirement of fair return on value in rate regulation for

(continued...)

'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.' There is no requirement that the apartments in question be used for purposes which bring them under the Act. Of course, price

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(...continued)
public utilities to the requirement of just compensation for taking of property by eminent domain, but relied on the war powers doctrine to sustain application of the law to rental property. "[W]e are satisfied that principles derived from the law of eminent domain are not the proper constitutional criterion for determining the validity of a nation-wide program of price and rent control enacted by Congress under its war powers. In the case of public utilities there is an extensive and permanent regulation of the use of the properties in the public interest, of which the regulation of rates is only a part. The situation more nearly approaches a 'taking' of the properties, or the use thereof, than in the case of war-time rent regulation. . . . [T]he Emergency Price Control Act is concerned with the regulation of prices and rents which are normally determined by the operation of economic forces in a free competitive market; it is not designed 'as a permanent substitute for the normal operation of competitive forces, but as a bridge over a period of emergency when the normal influences of the market place are temporarily distorted by war conditions.' The useful life of housing accommodations extends far beyond the contemplated period of rent control. There is, in fact, no appropriation of the housing accommodations at all, and so far as there is a narrow restriction on their use, it is for a very limited period. 'A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.' *Block v. Hirsh*, 1921, 256 U.S. 135, 157, 41 S.Ct. 458, 460, 65 L.Ed. 865, 16 A.L.R. 165. . . . The landlord is . . . free to occupy the property himself, or devote it to some commercial enterprise, or utilize it in any other way. This serves to emphasize that there has been no 'taking' of his property in the constitutional sense." (*Id.* at pp. 351-352.)

control, the same as other forms of regulation, may reduce the value of the property regulated. But as we have pointed out in the *Hope Natural Gas Co.* case (320 U.S. p. 601), that does not mean that the regulation is unconstitutional. Mr. Justice Holmes, speaking for the Court, stated in *Block* v. *Hirsh*, *supra*, p. 155: 'The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.' A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. [Citations.] And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth." (*Bowles*, *supra*, 321 U.S. at pp. 517-518.)

This broad language in *Bowles* was immediately qualified, however, by the court's further observation: "*We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort.* [Citation.] A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property." (*Bowles*, *supra*, 321 U.S. at p. 519; italics added.)

In *Woods* the district court had enjoined enforcement of title II of the Housing and Rent Act of 1947 (61 Stat. 193, 196) on the ground that Congress's power to regulate rent ended with a presidential proclamation terminating hostilities. The high

court reversed, holding that the 1947 legislation was a valid exercise of the war power of Congress and rejected a claim that exemption of some classes of housing violated the Fifth Amendment.

Although the Supreme Court subsequently stated in *Pennell* v. *San Jose* (1988) 485 U.S. 1, 12, footnote 6, that it saw "no need to reconsider the constitutionality of rent control *per se*," and such reexamination may not have been necessary in that case, in fact the court has not upheld rent control against a takings clause challenge other than in wartime emergency circumstances. Those decisions do not uphold peacetime, nonemergency, rent control legislation of indefinite duration against a takings clause challenge either as to the denial of the property owner's right to receive whatever rent the free, competitive market will produce, or as to the restriction on the rights of the owner to use the property for any purpose, withdraw it from the rental market, or terminate tenancies. *Bowles* made it clear that whether a permanent rent control scheme constitutes a compensable taking under the Fifth Amendment is still an open question.[7]

More recently the Supreme Court has abandoned the concept of property clothed with a public interest the use of which could be restricted through exercise of the police power without compensation, turning instead in Fifth Amendment cases to an ad hoc determination of whether, because a particular regulation goes too far, a compensable taking has occurred.

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[7] I am not alone in this conclusion. (See Radford, *Why Rent Control is a Regulatory Taking*, 6 Fordham Envtl. L.J. 755. (Radford); Stout, *Making Room at the Inn: Rent Control as a Regulatory Taking* (1990) 38 Wash. U. J. Urb. & Contemp. L. 305.)
The petitioners in *Yee* v. *Escondido* (1992) 503 U.S. 519, 526 did not make a claim that rent control statutes violate the takings clause.

Penn Central, supra, 438 U.S. 104, and *Hodel* v. *Irving* (1987) 481 U.S. 704 (*Hodel*), exemplify this approach. The "taking" for which just compensation must be paid is not a taking of the entire property but of any of the interests in property, the "sticks" which make up the "bundle of rights" which an owner may claim. (See, e.g., *Hodel, supra*, 481 U.S. at p. 716 [right to devise property]; *Kaiser Aetna* v. *United States, supra*, 444 U.S. at p. 176 [right to exclude others].)

The concept of compensable regulatory taking, hinted at in the early rent control cases, had been expressly recognized earlier in *Penna. Coal* v. *Mahon* (1922) 260 U.S. 393 (*Pennsylvania Coal*), which confirmed that *Block* and its wartime rent control progeny were not a Supreme Court imprimatur for rent control legislation. There, owners of surface rights to property under which the coal company had reserved the right to remove all coal, with the surface owners waiving all claims for resulting damages, sought to prevent mining that would cause subsidence. They claimed that the company's rights had been abrogated by a state statute which forbade mining in a manner that would cause subsidence of a home. The company argued that if applied retroactively the statute would be unconstitutional. The state court upheld the statute as a legitimate exercise of the police power. The Supreme Court, in an opinion by Justice Holmes, reversed, stating as a general rule "that while property may be regulated to a certain extent, *if regulation goes too far it will be recognized as a taking*. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. [Citation.] In general it is not plain that a man's misfortunes or necessities will justify shifting the damages to his neighbor's shoulders. [Citations.] *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.* As we already have said this is a question of

degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They were to the verge of the law but fell far short . . . ." (260 U.S. at pp. 414-415, italics added.)

This limitation on uncompensated taking was echoed in *Armstrong* v. *United States* (1960) 364 U.S. 40, 49, where the court adopted the ultimate test of a compensable taking, one which is still applicable: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The court's first attempt to establish guidelines for determining whether a land use regulation goes too far and thus becomes a compensable taking came in *Penn Central*, *supra*, 438 U.S. 104. The court acknowledged that the constitutional concern recognized by Justice Holmes in *Pennsylvania Coal* and applied in *Armstrong* v. *United States*, *supra*, 364 U.S. 40, to government conduct which destroyed the value of privately held liens – whether in light of the nature of the restriction and its purpose, the property owner has been forced to bear public burdens which, in fairness and justice should be borne by the public as a whole—determines whether a land use regulation goes so far as to constitute a compensable taking.

In *Penn Central* the court then made it clear that the ultimate purpose of balancing the factors it has identified as relevant in deciding if a land use regulation goes too far is to ensure that land use regulations are not used to compel individuals to assume burdens that should be borne by the public as a whole. "While this Court has recognized that the 'Fifth

Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." (438 U.S. at pp. 123-124.) Thus, regardless of the manner in which the factors identified by the court as relevant to determining if a land use restriction is valid are applied, the question to be answered is always the same—is this landowner being forced to assume what should be a public burden. The court has repeatedly recognized this as the litmus test of a compensable taking. (See *Dolan* v. *City of Tigard* (1994) 512 U.S. 374, 384 (*Dolan*); *Lucas* v. *South Carolina Coastal Council*, *supra*, 505 U.S. at p. 1018; *Pennell* v. *City of San Jose*, *supra*, 485 U.S. at p. 9; *First Lutheran Church* v. *Los Angeles County* (1987) 482 U.S. 304, 318-319; *Hodel*, *supra*, 481 U.S. at p. 714; *Kaiser Aetna* v. *United States*, *supra*, 444 U.S. at p. 176.)

In *Penn Central*, the court identified two factors whose relevance had been recognized in earlier cases as important in determining whether application of a land use regulation constitutes a taking:

1. The economic impact of the regulation on the property owner, particularly the extent to which the regulation interferes with distinct investment-backed expectations.

2. The character of the governmental action – physical invasion is more readily found to be a taking than interference caused by a public program which adjusts the benefits and burdens of economic life to promote the common good. Restrictions designed to enhance the quality of life by preserving desirable aesthetic features and zoning laws were given as examples of laws which prohibit beneficial uses and may cause

substantial individual harm, but nonetheless have been upheld as permissible because they promote the health, safety, morals, or general welfare of the public. (*Penn Central*, *supra*, 438 U.S. at pp. 125-129.)

Application of a landmarks preservation law to the Penn Central Grand Central Terminal property in New York City was upheld because the law was substantially related to promotion of the general welfare, it permitted beneficial use of the property as it did not interfere with the existing use, it was not shown that all use of the air space above the terminal was prohibited, and the owner was granted transferable development rights which could be used to develop other properties.

The economic impact of the regulation, its interference with investment-backed expectations and the character of the governmental action are factors which the high court continues to recognize as having particular significance. (*Hodel, supra*, 481 U.S. at p. 714; *Kaiser Aetna* v. *United States*, *supra*, 444 U.S. at p. 175.) In *Hodel*, *supra*, 481 U.S. at page 715, the court also recognized another factor which is particularly significant in the rent control arena and was first applied in *Pennsylvania Coal*, *supra*, 260 U.S. at page 415—the "reciprocity of advantage" between the government and the owner whose property rights are restricted.[8]

Finally, regardless of the relative weight of these factors, a land use restriction will constitute a taking for which just compensation must be paid if it does not "substantially advance

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[8] In *Lucas* v. *South Carolina Coastal Council*, *supra*, 505 U.S. 1003, the court noted only two categories of interference which inevitably go too far and for which just compensation is mandated by the Fifth Amendment—physical occupation of any part of the property (see *Loretto Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419) and a regulation which denies the owner all economically beneficial or productive use of land (see *Agins*, *supra*, 447 U.S. 255).

legitimate state interests." (*Lucas* v. *South Carolina Coastal Council, supra*, 505 U.S. at p. 1016; *Agins, supra*, 447 U.S. at p. 260.)

This court has upheld local rent control, but only against due process based challenges. (See *Fisher* v. *City of Berkeley* (1984) 37 Cal.3d 644; *Birkenfeld* v. *City of Berkeley* (1976) 17 Cal.3d 129.) While the court has concluded that such legislation is a proper exercise of the police power even in the absence of an emergency, the court has never applied takings clause jurisprudence to such laws.

The assumption of the majority that just compensation need not be paid for the application of rent control to private property thus finds no support in the authorities on which they rely.

IV

Does This Complaint State Facts To Show That The Santa Monica Ordinance Has Not Substantially Advanced Legislative Goals?

The majority make no effort to address this crucial question, digressing instead into the effort to determine whether *Nollan, supra*, 483 U.S. 825, and *Dolan*, supra, 512 U.S. 374, somehow establish a level of judicial scrutiny applicable in takings clause cases in which it is claimed that a land use regulation fails to substantially advance a legitimate governmental purpose. The "substantially advance" test, the aspect of takings clause jurisprudence on which plaintiff relies, is not new. It was applied in *Agins, supra*, 447 U.S. at page 261, and is derived from *Nectow* v. *Cambridge* (1928) 277 U.S. 183, 188. *Nollan* and *Dolan* did no more than demonstrate the effect of the test in an "as applied" challenge to an administrative adjudicative application of a land use regulation. In so doing, the United States Supreme Court made it clear beyond any question that the protection of property rights guaranteed by the takings clause is independent of and broader than the

protections afforded by the due process clause. The court also made it clear that whenever a takings clause claim is before a court, the role of the court is to hear or consider evidence and make factual findings to support a ruling on a well-pleaded takings claim.

The complaint in this action alleges facts which, if proven, will establish that the uncompensated taking of plaintiff's property rights brought about by the Santa Monica rent control ordinance cannot be justified under the takings clause because, after a reasonable period of implementation, the ordinance has not substantially advanced the goals which justified the restrictions on plaintiff's rights. Instead of preserving affordable housing for tenants unable to pay market rents, the ordinance has created a haven for tenants regardless of their ability to pay while decreasing the number of rental units occupied by tenants intended to be benefited.

The Santa Monica rent control ordinance has now been in effect for 20 years, a long enough period to evaluate whether it does, in fact, substantially advance its purpose. The majority nonetheless hold that the complaint does not state a cause of action and deny plaintiff the right to attempt to prove that the Santa Monica rent control ordinance has not preserved the supply of affordable rental housing for low-income tenants, families with children, the elderly, or other tenants in need of "affordable" rental housing.

The majority do so on the basis of their erroneous conclusion that a deferential standard of review is permissible, and in the erroneous belief that the complaint fails to state facts sufficient to support the claim that the ordinance has not substantially advanced a legitimate goal.[9] The majority also

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[9] To the extent that this holding is based on a perceived inadequacy of the census data to support the claim, the majority again err. The plaintiff need only allege facts. (Code Civ. Proc., (continued...)

express concern that declaring that a rent control law which has not achieved its purpose constitutes a taking for which compensation must be paid would be a "judicial repeal" of the law. Unwilling to recognize our obligation to consider whether a once valid law may over time or in light of changed circumstances no longer advance it purpose, the majority defer to legislative judgment in justification of its refusal to permit this action to go to trial. None of the majority's reasons supports the result they reach.

A. Deference.

Plaintiff's claim that the Santa Monica ordinance has not substantially advanced the legislative purpose is not a facial attack on the Santa Monica ordinance. Nor is it a traditional as applied attack claiming that a newly enacted ordinance may not be applied to plaintiff's property without compensation. Instead plaintiff assumes the initial validity of the law on its face and as applied, and claims that the ordinance has not substantially advanced the purpose the enacting body believed would justify restricting the rights of rental property owners. For purposes of analyzing the merits of this claim is not necessary to pigeonhole this plaintiff's claim as a "facial challenge" or an "as applied challenge" because, as I have suggested above, deference to the legislative judgment that the means selected in a land use

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§ 425.10, subd. (a).) All that is necessary is that the pleading as a whole apprise the defendant of the factual basis of the claim. (*Jackson* v. *Superior Court* (1994) 30 Cal.App.4th 936, 942; *Semole* v. *Sansoucie* (1972) 28 Cal.App.3d 714, 718; see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 339, p. 437.) Santa Monica Beach, Ltd., has done that. There is no requirement that all evidence that might support the claim be recited in the complaint. A plaintiff may obtain additional evidence after the filing of the complaint.

regulation to achieve a public welfare goal will achieve that goal is not warranted in any takings clause claim.

Deference to the legislative body's choice of means by which to achieve a public welfare goal is generally required not only to maintain proper balance under the separation of powers doctrine, but also in recognition that a legislative body seeking a solution to problems affecting the public welfare must be afforded a reasonable opportunity to experiment with possible solutions. The reasons for and importance of judicial deference for this purpose are perhaps best expressed by Justice Brandeis, albeit in dissent, in *New State Ice Co.* v. *Liebman*, *supra*, 285 U.S. 262: "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . [¶] To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. The Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must ever be on our guard, lest we erect our prejudices into legal principles." (285 U.S. at p. 311 (dis. opn. of Brandeis, J.), fn. omitted.)

When a claim for just compensation is made under the takings clause, however, deference is neither appropriate nor permitted. Under our system of government, the court, not the legislative body or the electorate, must determine whether governmental action impermissibly invades rights protected by the constitution. "As stated by this Court in *West Virginia State*

Bd. of Educ. v. *Barnette*, 319 U.S. 624, 638, 'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." (*Lucas* v. *Colorado Gen. Assembly* (1964) 377 U.S. 713, 736-737, fns. omitted.) While the court may defer to the judgment of a legislative body or the electorate that a rent control ordinance is necessary to address a social or economic problem, the court may not do so when it is claimed that the impact of the ordinance is a compensable taking.

A claim based on the theory that just compensation is due because a rent control ordinance has not substantially advanced the legislative purpose advanced in justification of the resulting restriction of property owner's rights is one of first impression in this court. It is not novel, however. The Supreme Court recognized that an owner of rent-controlled property may offer evidence to demonstrate that the circumstances which once justified imposition of rent control no longer do so in *Chastleton Corp.* v. *Sinclair*, *supra*, 264 U.S. 543. There a Fifth Amendment-based challenge to a rent control order was brought after the war emergency which initially justified rent control allegedly had ended. The rent control order had been made under the authority of statute purporting to extend the act upheld in *Block*, *supra*, 256 U.S. 135. In a context closely analogous to the instant case the court said: "The order, although retrospective, was passed some time after the latest statute, and long after the original act would have expired. In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. It is a matter of public knowledge that the Government has considerably diminished its demand for employees, that was one of the great causes of the sudden afflux of people to Washington, and that other causes have lost at least much of their power. "It is conceivable that, as is shown in an affidavit attached to the bill, extensive activity in building has added to the ease of finding an

abode. If all that remains of war conditions is the increased cost of living that is not in itself a justification of the act. Without going beyond the limits of judicial knowledge, we can say at least that the plaintiffs' allegations cannot be declared offhand to be unmaintainable, and that it is not impossible that a full development of the facts will show them to be true. In that case the operation of the statute would be at an end." (264 U.S. at p. 548.)

It seems clear, therefore, that plaintiff may pursue its claim that the Santa Monica ordinance has not substantially advanced the legislative purpose and must be allowed to introduce evidence to support its claim. When plaintiff does so the evidence must be weighed by the trier of fact. There is no room for deference in this factual determination.

Nollan and *Dolan* confirm that the substantially advance test is not a standard of review, but a fact-based inquiry.[10] Both

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[10] The majority's willingness to defer to legislative judgment in this case is curious. In *Professional Engineers* v. *Department of Transportation* (1997) 15 Cal.4th 543 (*Professional Engineers*), a majority of this court refused to defer to legislative judgment, but here the majority see no inconsistency in refusing to permit this plaintiff to offer evidence that the Santa Monica ordinance does not substantially advance the legislative purpose. They attempt to distinguish this case as one involving neither a "fundamental" right nor a constitutional provision that has been "construed to prohibit a certain type of government action absent specific factual findings."

The popular view that property rights receive a lesser degree of constitutional protection because they are not "fundamental" is itself suspect. Protection against taking without due process or just compensation has been accorded to property rights under the United States Constitution since 1791 when the Fifth Amendment was ratified as part of the Bill of

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Rights. The same protections have existed in California since this state joined the Union in 1850, set out in the Declaration of Rights (art. I) of both the 1849 and the 1879 California Constitutions. Nothing in either the federal or the state Constitution suggests an understanding that property rights are inferior to other rights accorded constitutional protection or that the drafters did not consider property rights as "fundamental" as the other rights sought to be protected. Indeed, the tenor of the time suggests otherwise. (See *Calder* v. *Bull* (1798) 3 U.S. (3 Dallas) 386, 388 (opn. of Chase, J.) ["An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . [¶] . . . a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it."])

Nonetheless, a judicially created hierarchy has relegated property rights to a second class status which, it is claimed, justifies a distinction between property rights and "fundamental" rights when the validity of legislation impinging on constitutional rights is called into question. Although constitutionally unsupportable, this distinction persists in decisions of this court and the United States Supreme Court and underlies much of the reasoning and analysis of the majority.

In my view the right to just compensation for property taken by the government is very fundamental. Be that as it may, however, a claim for just compensation made under the takings clause as construed in *Agins*, and applied in *Nollan* and *Dolan*, does require specific factual findings. Indeed, as the majority recognize elsewhere (*ante*, at p. 12), determining whether a taking occurs under a land use regulation requires "'essentially ad hoc, factual inquiries.'" (*Lucas* v. *South Carolina Coastal*

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assessed administrative application of land use regulations to a particular property. Neither gave any deference to or even considered whether the original legislative judgment that the enabling legislation would advance the legislative body's stated purpose was reasonable. Instead both *Nollan* and *Dolan* recognized that in an as applied challenge under the takings clause, the state bears the burden of demonstrating that the fit or nexus between the legislative goal and application of the law to the property in question meets the constitutional standard for an uncompensated taking, i.e, that the regulation substantially advances that goal. (*Dolan*, *supra*, 512 U.S. at p. 386; *Nollan*, *supra*, 483 U.S. at p. 837.)

The substantially advance test thus establishes an evidentiary burden the government must carry in the trial court or administrative proceeding to justify application of a land use regulation to an individual parcel of property, not a standard of judicial review or level of judicial scrutiny. To the extent that a standard of review by an appellate court is implicated the law is settled. Because the claim involves taking a vested right in property the court must exercise its independent judgment on the evidence. (*Halaco Engineering Co.* v. *South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 64, fn. 10.) Here, therefore, the court must exercise its independent judgment in determining whether plaintiff has demonstrated that the Santa Monica ordinance has not substantially advanced the purpose offered by the city in justification of the restriction on plaintiff's

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Council, *supra*, 505 U.S. at p. 1015.) By characterizing the question presented here as the extent to which the government may regulate rent increases, the majority avoid this inescapable conclusion. The issue here is not the extent to which rents may be regulated. It is whether the regulation imposed by the Santa Monica ordinance constitutes a taking because it does not substantially advance the legislative purpose. That is a factual question.

property rights. That can be done only after plaintiff is allowed to present evidence on the question.

The takings clause permits no less as demonstrated by *Nollan* and *Dolan* where the court did not defer to legislative judgment in an as applied challenge and *Agins* in which it did not do so in a facial challenge to restrictions on property rights. Instead in *Nollan*, *supra*, 483 U.S. at page 838, and *Dolan*, *supra*, 512 U.S. at page 395, the court held, based on the evidence, evidence that the majority will not permit plaintiff to offer here, that the nexus between the property restriction and the legislative goal did not meet the constitutional mandate that the restriction substantially advance that goal. Therefore the restriction was a compensable taking. In *Agins*, *supra*, 447 U.S. at page 462, the court held that the zoning ordinance in question there did not, in fact, prevent the best use of the affected land or extinguish a fundamental attribute of ownership.

The majority are correct in holding that *generally* when a *facial* challenge to the validity of a statute is made on the ground that a legislative body has exceeded the proper scope of the police power, the role of the court is simply to determine whether (1) the legislative body has identified the existence of a problem affecting the health, safety, or general welfare of the public, thus justifying exercise of the police power to regulate individual conduct, and (2) has selected means reasonably related to achieving the legislative goal. In those inquiries deference to the legislative body's findings and judgment is proper. Deference is not appropriate or permitted when the statute is challenged as violative of the takings clause, however. As I have shown, *Nollan*, *supra*, 483 U.S. 825, and *Dolan*, *supra*, 512 U.S. 374, do not support the contrary conclusion reached by the majority.

Moreover, the nature of the inquiry mandated by the takings clause precludes another aspect of the analysis by which the majority rejects plaintiff's claim. When determining if the restriction on the property owner's rights substantially advances

the legislative goal, the inquiry of necessity requires that the stated goal of the legislative body be the object of the inquiry. The court may not, as the majority do, follow due process jurisprudence to uphold uncompensated application of a land use regulation on the ground that the regulation serves another purpose. When a law restricting property rights without affording compensation has a stated goal, the judiciary is under no compulsion and has no authority to uphold the continued denial of compensation on the basis that the law might serve another unstated legislative goal. Were that the rule, it would be an open invitation to judicial legislation, and the substantially advance test enunciated in *Agins* would be meaningless. *Agins* assumes that the legislative purpose to be advanced by a land use regulation is that contemplated by the body which enacted the regulation.

Additionally, even when a property regulation passes the substantially advance test, compensation may be required. In a challenge based on the takings clause the court must also independently determine whether the law goes too far. "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." (*Agins*, *supra*, 447 U.S. at p. 260; see also *Nollan*, *supra*, 483 U.S. at p. 835, fn. 4.) This mixed question of law and fact cannot be resolved through deference to the legislative judgment. Instead, whether a land use regulation goes too far requires, as the high court explained in *Penn Central*, *supra*, 438 U.S. 104, an ad hoc factual determination in every case to determine whether the regulation forces a property owner to bear public burdens which in fairness and justice should be borne by the public. In a takings clause challenge to the facial validity of a law regulating private property, the court may first inquire whether the regulation is a permissible exercise of the police power. Only in that inquiry, basically a due process inquiry, is deference to legislative findings appropriate. *Agins* established the standard of review

to be applied to the additional inquiries a court must undertake when the takings clause is invoked, however—whether the property rights restriction will "substantially advance" the legislative goal *and* whether the regulation goes too far and imposes public burdens on the property owner. These factual questions do not permit a deferential inquiry.

Nowhere in the majority opinion is there a critical examination of whether, in light of the facts alleged, the Santa Monica rent control ordinance has *substantially* advanced the purpose offered by the legislative body in justification of the restrictions the ordinance places on owners of rental property.

I conclude that the facts alleged in the complaint are sufficient to state a cause of action on the theory that the Santa Monica rent control ordinance has not substantially advanced its purpose, and, as discussed below, on the theory that it imposes on owners of rental property a burden that should be borne by the general public. The complaint does state a cause of action in inverse condemnation.

The majority's conclusion that the complaint fails to state a cause of action because plaintiff does not allege that that the Santa Monica ordinance has failed to substantially advance the broad legislative purpose of protecting *all* tenants of rental property also lacks merit. If plaintiff can show that the principal goal of the legislation—preserving affordable housing for low-income tenants, minorities, families with children, and the elderly, has not been met, it cannot be said that the law has *substantially* advanced the legislative purpose simply because some tenants now benefit.[11]

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[11] It might not be inappropriate to take judicial notice that tenants well able to afford market rents continue to occupy rent-controlled apartments in Manhattan for their lifetimes, paying only a few hundred dollars for apartments that would rent for thousands in a free market. In some cities, including Santa

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Monica, would-be tenants pay thousands of dollars in "key money" to landlords for the right to rent desirable units, agreeing also to make all repairs, knowing that once they become tenants they will not have to pay market rent and cannot be evicted. With regard to the impact of rent control in Santa Monica in particular, see Wilkinson, *Death Threats and Long Waiting Lists, Santa Monica: A House Divided by Rent Control,* Los Angeles Times (Apr. 29, 1989) p. 1-1, col. 1.)

When rent control becomes this perverted, it can hardly be said that it has substantially advanced its purpose.

Moreover, empirical studies of rent control in several United States cities, including Santa Monica, have shown that far from mitigating the shortage of affordable housing, in rent-controlled cities the supply of affordable housing has been reduced, harsh costs have been imposed on the groups the Santa Monica ordinance particularly seeks to protect, and both the quantity and quality of rental housing in those cities has decreased. (See Radford, *supra*, 6 Fordham Envtl. L.J. at pp. 669-770, and authorities cited.) The author observes: "A sizable body of research suggests that rent control not only reduces the available stock of affordable housing, but also redistributes this dwindling supply regressively within the population of renters. [¶] In California, rent control has tended to be adopted in cities with relatively wealthy electorates. The demographic evidence has never supported the claim that rent control was adopted in these cities to ease the burdens of the poor. Instead . . . 'the major beneficiary of regulatory controls in each case was (and still is) a population that is firmly entrenched in the middle class.'" (*Id.* at pp. 770-771.)

The assumption of the majority that the political process is adequate to correct any injustice to owners of rental property subject to rent control reflects a startling naivete for a court which sits in a rent-controlled city in which a substantial

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B. Judicial "Repeal."

As noted above, the plaintiff here does not seek to invalidate the Santa Monica ordinance. It seeks only just compensation for application of the ordinance to its property. A holding that compensation must be paid would not repeal the ordinance.

Moreover, a land use regulation which has a legitimate governmental purpose may be valid notwithstanding a conclusion that compensation must be paid because the regulation goes too far. The property may be taken or the property right restricted under the regulation, but just compensation must be paid when the regulation is applied.

This is so because the takings clause does not bar a governmental taking of private property. (*First Lutheran Church, supra*, 482 U.S. at p. 315; *Williamson Planning Comm'n.* v. *Hamilton Bank* (1985) 473 U.S. 172,195; *Hodel* v. *Virginia Surface Mining & Recl. Assn., supra*, 452 U.S. at p. 297, fn. 40.) The due process clause does so if there is no proper governmental purpose, but the takings clause simply mandates that just compensation be paid if property is taken or physically invaded, if a regulation of property goes too far, or if

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majority of voters are renters. It is axiomatic, of course, that the protections embodied in the Bill of Rights exist to ensure that majoritarian preference will not suffice to deny citizens those rights. "The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." (*Hunter* v. *Erickson* (1969) 393 U.S. 385, 392; see also *Eastlake* v. *Forest City Enterprises, Inc., supra*, 426 U.S. at p. 676; *Lucas* v. *Colorado Gen. Assembly, supra*, 377 U.S. 713, 736-737; *West Virginia State Bd. of Educ.* v. *Barnette* (1943) 319 U.S. 624, 638.)

a regulation does not substantially advance the governmental purpose.

Assuming arguendo that the complaint does seek invalidation of the ordinance or that invalidation would be the inevitable result of finding that it has not substantially advanced its purpose, there would be no basis for the majority's concern that judicial recognition that the rent control ordinance takes property without just compensation would be an impermissible or unprecendented judicial repeal of the ordinance.

The majority position reflects an erroneous view of the proper role of the judiciary. Reviewing legislation to ensure that the law does not offend the Constitution has been recognized as a proper exercise of the judicial role for almost 200 years, since *Marbury* v. *Madison*, *supra*, 5 U.S. (1 Cranch) 137. As the Supreme Court recognized there, determining the constitutional validity of legislation "is of the very essence of judicial duty." (*Id.* at p. 178.)

This duty is not confined to assessing the constitutional validity of legislation or its application at the time of its enactment. The United States Supreme Court has rejected the majority's restrictive view of the judicial role, one which fails to acknowledge the power and duty of the court to reconsider the validity of a law in light of actual experience with its operation. The high court did so in *Chastleton Corp.* v. *Sinclair*, *supra*, 264 U.S. 543 (*Chastleton*), when asked to consider if the emergency conditions created by World War I still existed in the District of Columbia and thus continued to justify rent control. In so doing it stated: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. *Perrin* v. *United States*, 232 U.S. 478, 486, 487. *Missouri* v. *Chicago, Burlington & Quincy R.R. Co.*, 241 U.S. 533, 539, 540." (264 U.S. at pp. 547-548.) The court's remand to the District of Columbia courts for an evidentiary proceeding where the facts could more conveniently be "accurately

ascertained and carefully weighed" and "preserved so that if necessary it can be considered by this Court" (*id.* at p. 549) confirms that the judiciary has both the power and the obligation to consider evidence of changed conditions and, where necessary, to declare a law invalid.

The majority dismiss *Chastleton*, *supra*, 264 U.S. 543, as a questionable precedent, apparently finding it relevant only to whether rent control is permissible absent emergency conditions. The decision stands for a more important principle, however,—the duty of the court to consider changed conditions in assessing the *continued* validity of a law that restricts property rights or, as here, to whether a regulation of property has over time failed to substantially further its purpose. Unwilling to assume that duty, the majority claim it would be too difficult to decide when such a claim should be entertained and assert that the court's power to invalidate a statute on the basis of changed conditions is narrowly circumscribed. Of course, the difficulty of decisionmaking cannot justify abdication of judicial duty. The majority give no reason other than avoiding judicial "activism" for concluding that this plaintiff's claim does not fall within the narrowly circumscribed judicial power to declare invalid a statute which impermissibly impinge on constitutional rights.

The *Chastleton* rule is neither suspect or circumscribed in the manner suggested by the majority. *Abie State Bank* v. *Weaver* (1931) 282 U.S. 765, is to the same effect. There the validity of a statute authorizing special assessments made under a state statute had been upheld against a takings clause challenge before the plaintiffs brought the action then before the court to enjoin collection of the assessment. The high court rejected a challenge based on the prior adjudication of validity stating: "As to the first objection, it is sufficient to say that the Bank Guaranty Law was sustained by this court as a police regulation [citations] and that a police regulation, although valid when made, may become, by reason of later events, arbitrary and

confiscatory in operation. [Citations.] In the *Shallenberger* case [*Shallenberger* v. *First State Bank of Holstein* (1911) 219 U.S. 114], *the suit was brought immediately upon the enactment of the law, and that decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing the validity of assessments in the light of the later actual experience.*" (282 U.S. at p. 772, italics added; see also *Nashville, C. & St. L. Ry.* v. *Walters* (1935) 294 U.S. 405, 415 ["A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by a change in the conditions to which it is applied." (Fns. omitted.)].)

This court, too, has recognized that the initial validity of a statute does not preclude a subsequent challenge to its continued validity. "*[I]n the absence of a constitutional objection* . . . the courts have no right to declare a statute obsolete by reason of a supervening change in the conditions under which it was enacted. (*Palermo* v. *Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 63, italics added.) "'A change of conditions may invalidate a statute which was reasonable and valid when enacted.' (*Perez* v. *Sharp* (concurring opinion) 32 Cal.2d 711, 737.) Also due weight must be given to new and changed conditions. (*Skalko* v. *City of Sunnyvale*, 14 Cal.2d 213, 216; *Bernstein* v. *Smutz*, 83 Cal.App.2d 108; *Endara* v. *City of Culver City*, 140 Cal.App.2d 33.)" (*Gaylon* v. *Municipal Court* (1964) 229 Cal.App.2d 667, 671-672.)

Skalko v. *City of Sunnyvale* (1939) 14 Cal.2d 213 (*Skalko*), which the majority concede is relevant, applies this rule to a zoning ordinance which, because of changed conditions over a period of time, no longer carried out the legislative intent and, in the view of this court, had become confiscatory. We held there that "the police power must be applied to existing conditions. [Citation.] 'The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of

the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable'. (*Abie State Bank* v. *Bryan*, 282 U.S. 765.) When conditions have changed since the legislative action was taken, 'statutes and ordinances, which, after giving due weight to the new conditions are found clearly not to conform to the Constitution, of course, must fall'. [Citation.] The question, therefore, is whether under the facts shown by the appellant his rights are now being invaded by the existence and maintenance of the ordinance." (14 Cal.2d at p. 216.)

Contrary to the majority, I conclude that the same rule must apply when a statute that was a valid exercise of the police power when enacted, because it was reasonably designed to achieve a proper governmental purpose, but would otherwise impermissibly infringe on private property rights, is shown after a reasonable period of implementation to fail to achieve that purpose. Although *Skalko* was an as applied challenge to the continued validity of the zoning ordinance, there is no reason that the rule should not be equally applicable to a challenge like this to the continued application, without just compensation, of a rent control ordinance that does not achieve the legislative purpose which justified it.

Plaintiff has brought such a challenge. It has alleged facts to support its claim that the Santa Monica rent control ordinance has not achieved the legislative purpose which justified it. If so, just compensation must be paid if the law is to continue to be applied. I find it remarkable that the majority justify their refusal to follow *Chastleton* and *Skalko* to enforce the takings clause on the ground that carrying out the court's constitutional duty would force the court into an activist role. Two centuries of jurisprudence since *Marbury* v. *Madison*, *supra*, 5 U.S. (1 Cranch) 137, have escaped notice. Apparently questions of first impression will no longer be entertained lest their resolution propel the court into an activist role.

VI

The Complaint Also States Facts To Show That The Santa Monica Rent Control Ordinance Goes "Too Far"

Rent control is not simply a species of price control subject to a due process-type analysis like that undertaken by the majority. The analytical focus in assessing whether rent control constitutes a taking for which the takings clause of the Fifth Amendment mandates just compensation must be directed to the means by which rent control accomplishes its purpose. The Santa Monica rent control ordinance takes from the property owner the right to charge market rent for the owner's property and by so doing compels the owner to subsidize the tenant. It depresses the value of the rent-controlled property. Under a scheme like that before the court the tenant is given the right to occupy the owner's property for an indefinite period. Finally, except to the extent it has been superseded by state law (see Gov. Code, § 7060 et seq.), the Santa Monica ordinance restricts the ability of the owner to turn the property to other uses.

Even when the public purpose of rent control, that of ensuring a supply of affordable housing, is achieved, the property owner does not receive a reciprocal benefit corresponding to or justifying the restriction on the owner's property rights. Thus, the property owner is forced to bear the burden of providing affordable rental housing to those tenants unable to pay market rents, a burden that in justice should be borne by the community as a whole. This burden is not imposed on the property owner because rent control is the only or even the best means of ensuring affordable housing. Governmental rent subsidies and/or government assistance in creating affordable housing through new construction or rehabilitation of existing, underutilized structures can achieve the same end while better ensuring that the low-cost housing thereby created is occupied by persons who most need assistance with rent. When a city resorts to those alternatives, the public bears the burden as the cost is shared by all through taxes. A city which opts instead

for rent control to achieve its purpose puts what should be recognized and assumed as a public burden on the owner of rental property.

None of this is true of other forms of price control. While they, too, restrict an investor's right to maximize the return on the investment, they do not control the use or disposition of the property in which the investment is made. No individual is given the right to use property owned by another. Under price control the owner may destroy and/or turn the property that generates the controlled item to other uses. No individual is directly subsidized by the price restriction and the public as a whole, not solely the individuals who use the investor's product, benefits. Therefore, while there may be some burden on use of the income-generating property, and the takings clause may not require that just compensation be paid when other forms of price control are instituted, those types of price control are not analogous to rent control.

The majority not only abdicate the judicial role by refusing to assess whether the Santa Monica ordinance has substantially advanced its declared purpose, they also fail to recognize the court's duty to assess whether the various restrictions the Santa Monica ordinance has imposed on the owners of rental property in using that property go too far by imposing on owners of rental property the burden of subsidizing tenants.

The complaint in this action states facts to establish a taking without payment of just compensation to owners of rental property in violation of the takings clause on this ground. The Santa Monica rent control ordinance causes a taking for which compensation must be paid because it imposes on owners of rental property a burden that in fairness and justice should be borne by the public as a whole. The ordinance compels the owners of rental property to subsidize the housing costs of their tenants, denies owners the option of turning the property to other uses, and invests the tenants with lifetime occupancy rights—all

for the purpose of providing a supply of "affordable" rental housing for tenants.

For those reasons the Santa Monica ordinance does not withstand scrutiny under the standards by which a court determines whether a land use regulation goes too far. Regardless of how the factors the Supreme Court has indicated are relevant to that determination are weighed, the law cannot satisfy the ultimate test—does it impose on owners of rental property a burden that in justice and fairness should be borne by the public as a whole. Santa Monica may not compel the owners of grocery stores to subsidize their needy customers. Subsidizing rent or other necessities of life for persons in need of financial assistance is a public responsibility to be financed through general tax revenues. It is not an obligation of owners of rental property. The city has no right to shift the burden of subsidizing housing to the owners of rental property.

Application of the *Penn Central* and "reciprocity of advantage" factors leads to the same conclusion—the Santa Monica rent control ordinance goes too far. The ordinance has a significant economic impact on a property owner, not only through devaluation of the controlled property, but also in compelling the owner to forego market rate rental income. In addition to taking from the owner the right to have rents determined by market forces, the Santa Monica law takes the right to terminate tenancies and select new tenants, and even the right to go out of the rental business short of simply leaving the property unoccupied. The ordinance totally frustrates the investment-backed expectations of any owner who invests in rental property, and particularly those who owned property before the law was enacted.

The character of the governmental action—controlling rent in order to forestall excessive and exorbitant rent increases—may have a proper governmental purpose insofar as it assists persons unable to afford safe and decent housing, but to achieve that purpose the law requires private property owners

to subsidize their tenants. That is a burden that in fairness and justice should be borne by the community as a whole. "[R]ent control obviates the need to put public money behind public measures." (Jones, *Confiscation: A Rationale of the Law of Takings* (1995) 24 Hofstra L. Rev. 1, 84.) And, as noted above, the Santa Monica ordinance compels owners of rental property to subsidize even the wealthy.

Finally, there is no "reciprocity of advantage" whatsoever in being subject to the Santa Monica rent control ordinance. The community benefits because Santa Monica is able to provide "affordable" housing without using general tax revenues to do so. This is not comparable to the community benefit generated by zoning laws and similar land use restrictions which enhance the value of many, if not most, properties and protect the quality of life for all residents, however. Under the Santa Monica ordinance the benefits all flow one way, to the tenant who is subsidized and the taxpayers who are relieved of the burden of providing affordable housing through general tax revenues. The owner of rental property, on the other hand, receives no benefit from the rent control ordinance and the value of the rent-controlled property declines.

"The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that 'public burdens . . . should be borne by the public as a whole,' *Armstrong*, 364 U.S., at 49, this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation,' which can disproportionately

burden particular individuals." (*Pennell* v. *San Jose*, *supra*, 485 U.S. 1, 21-22 (dis. opn. of Scalia, J.).)

Although Justice Scalia was addressing a provision of the San Jose rent control ordinance which permitted the administrators to consider tenant hardship in fixing rents, and he assumed the validity of rent control to prevent excessive rent, his reasoning is equally applicable to rent control in general. The Santa Monica rent control ordinance forces owners of rental property to bear what should be a public burden. It thus creates a taking of property from any owner of rental property to which it is applied, a taking for which the takings clause mandates just compensation.

I would affirm the judgment of the Court of Appeal.

BAXTER, J.

DISSENTING OPINION BY CHIN, J.

The majority, in analyzing this case, inappropriately conflates takings jurisprudence with due process jurisprudence, thus undoing much of our effort in *Kavanau* v. *Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761 to disentangle these two areas of law. It cites due process cases, though we are addressing a takings clause challenge to Santa Monica's rent control law (see, e.g., maj. opn., *ante*, at pp. 16-17), and it ultimately applies a due process standard (*id.* at pp. 17, 23). If the majority were to adhere to the standards applicable under the takings clause, instead of trying to alchemize those standards into due process standards, I believe it would conclude, as I do, that plaintiff has adequately stated a cause of action. Accordingly, I dissent.

The due process clauses of the state and federal Constitutions guarantee property owners "due process of law" when the state "deprive[s] [them] of . . . property." (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, §§ 7, 15.) On the other hand, the takings clauses of the state and federal Constitutions guarantee property owners "just compensation" when their property is "taken for public use." (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19.) Although these constitutional provisions are facially similar, they limit the legislative power of government in different ways, and they have given rise to two separate, though sometimes overlapping, bodies of law.

Among other things, the due process guaranty prohibits regulations that are "arbitrary" or "discriminatory" or lacking "a reasonable relation to a proper legislative purpose." (*Nebbia* v. *New York* (1934) 291 U.S. 502, 537.) This standard is often referred to as the "rational basis" test because "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional [under the due process clause] unless . . . it is of such a character as to preclude the assumption that it rests upon *some rational basis* within the knowledge and experience of the legislators." (*U.S.* v. *Carolene Products Co.*

(1938) 304 U.S. 144, 152, italics added; see also *Washington* v. *Glucksberg* (1997) ___ U.S. ___ [117 S.Ct. 2258, 2271-2275].) As the words suggest, the rational basis test is highly deferential to legislative prerogative. Under that test, the government does not need to offer any evidentiary proof in defense of a regulation, and opponents of the regulation cannot defeat it "merely by tendering evidence in court that the legislature was mistaken." (*Minnesota* v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 464.)

The formulations applicable under the takings clause are, by comparison, quite different. Recent United States Supreme Court decisions emphasize a two-part analysis that focuses on the regulation's economic effect and the government's purpose. (*Yee* v. *Escondido* (1992) 503 U.S. 519, 523; *Keystone Bituminous Coal Assn.* v. *DeBenedictis* (1987) 480 U.S. 470, 484-485.) Under both the "effect" and the "purpose" sides of the analysis, the court has identified an extreme at which the regulation constitutes a per se taking requiring compensation. Thus, where the regulation's economic effect is total—that is, where it deprives a property owner of "all economically beneficial or productive use of land"—it constitutes a per se taking. (*Lucas* v. *South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015; *Agins* v. *Tiburon* (1980) 447 U.S. 255, 260.) Similarly, where the regulation's purpose is purely sophistic—that is, where it does not in fact "'substantially advance' the 'legitimate state interest' sought to be achieved"—it also constitutes a per se taking. (*Nollan* v. *California Coastal Comm'n* (1987) 483 U.S. 825, 834, fn. 3 (*Nollan*); see also *Dolan* v. *City of Tigard* (1994) 512 U.S. 374, 385 (*Dolan*); *Lucas* v. *South Carolina Coastal Council*, *supra*, 505 U.S. at p. 1016; *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, *supra*, 480 U.S. at p. 485; *United States* v. *Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126; *Agins* v. *Tiburon*, *supra*, 447 U.S. at p. 260.) The latter standard, to which I refer as the "substantially advance" standard, is thus simply the logical corollary of the former standard. In this case,

plaintiff asks us to interpret and apply the substantially advance standard. The majority does so, but in a way that ignores the words of the standard and renders it a mere vacuous shell.

We as judges write judicial opinions and articulate legal standards because we believe that words, though imperfect, have the power to convey objective meaning. And if words have that power, then a requirement that a law "'substantially advance' the 'legitimate state interest' sought to be achieved" (*Nollan*, *supra*, 483 U.S. at p. 834, fn. 3) is different from a requirement that a law not be "arbitrary," and, of course, it is different from a requirement that a law have a "rational basis." Nevertheless, the majority grafts these deferential due process standards onto the substantially advance standard.

True, the majority does not actually take the final step of expressly equating the substantially advance standard with the rational basis test. But it does almost the same thing when it declares that rent control constitutes a taking only if it is "arbitrary." (Maj. opn., *ante*, at pp. 17, 23.) I fail to see a practical difference between the majority's "rent control may not be arbitrary" rule and the rational basis test. If a law is not arbitrary, it is rational; if it is rational, it is not arbitrary. Thus, not surprisingly, due process cases frequently use the term "arbitrary" as a synonym for the lack of a rational basis. (See, e.g., *Carolene Products Co.* v. *U.S.* (1944) 323 U.S. 18, 31-32.) Moreover, the majority hints that the rational basis test probably applies here. (Maj. opn., *ante*, at p. 16.)

In *Nollan*, however, the high court unambiguously affirmed that the substantially advance standard is distinct from the rational basis test. (*Nollan*, *supra*, 483 U.S. at p. 834, fn. 3.) In an impressive display of judicial sleight of hand, the majority deftly explains away this language, stating that the substantially advance standard is actually not a single standard, but rather incorporates "different levels of takings scrutiny" (maj. opn., *ante*, at p. 15) that in *Nollan* meant one thing, but here mean near total deference to the Legislature. I disagree. Though the

substantially advance standard might be applied with particular care in certain types of cases (*Nollan*, *supra*, 483 U.S. at p. 841), it remains a single standard, not a multilevel standard that has a fluid meaning completely divorced from the natural meaning of the words that comprise it.

The majority cites footnote 8 in *Dolan*, *supra*, 512 U.S. at page 391, as proof that, in this case, the substantially advance standard is no different from the "not arbitrary" standard applicable in due process cases. That footnote, however, hardly purports to give content to the substantially advance standard. Rather, it addresses an argument in Justice Stevens's dissent concerning allocation of the burden of proof.

Justice Stevens argued that the burden of proof ought to rest on the party challenging the regulation, not on the governmental entity defending it. (*Dolan*, *supra*, 512 U.S. at pp. 409, 411 (dis. opn. of Stevens, J.).) In support of his argument, Justice Stevens cited *Moore* v. *East Cleveland* (1977) 431 U.S. 494, a due process case. (*Dolan*, *supra*, 512 U.S. at p. 409 (dis. opn. of Stevens, J.).) Justice Stevens does not say why he thought a due process case was relevant. In response to Justice Stevens, the *Dolan* court affirmed his assertion about the burden of proof in due process cases, but found it inapposite to the particular type of takings issue it was deciding. Thus, the court agreed with Justice Stevens that, "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." (*Id.* at p. 391, fn. 8.) But, in making this statement, the court was merely reiterating the appropriate due process standard to which Justice Stevens had alluded in his argument. The court might also have agreed with Justice Stevens about numerous other legal standards that similarly were not relevant. In any case, the court certainly would not have used a single sentence in a footnote responding to a dissent as the place to announce a new takings clause standard. Also, if the court had been discussing the takings

clause, not the due process clause, it would not likely have followed its statement with a citation to *Euclid* v. *Ambler Co.* (1926) 272 U.S. 365, a due process case. (*Dolan*, *supra*, 512 U.S. at p. 391, fn. 8.)

In sum, the court's parenthetical discussion in *Dolan* of the burden of proof in due process cases cannot fairly be read as stating the proper standard applicable in takings cases.

I do not advocate a return to the era of *Lochner* v. *New York* (1905) 198 U.S. 45, when courts routinely struck down economic regulations under the due process clause, thereby inhibiting the ability of government to restore confidence to the market place and to prevent exploitation of those who have little bargaining power. Appropriate regulation can serve to foster, not tax, economic growth and social well-being by creating and maintaining an environment conducive to beneficial commerce. On the other hand, I *do* advocate judicial reasoning that is clear and credible. No fair assessment of the words, "'substantially advance' the 'legitimate state interest' sought to be achieved" (*Nollan*, *supra*, 483 U.S. at p. 834, fn. 3), can equate them with a rule that limits compensable "takings" of private property to government action that is "arbitrary." Moreover, we can apply the high court's substantially advance standard faithfully, while still maintaining the appropriate deference to legitimate government efforts to regulate the use of private property.

The majority decries as "novel" (maj. opn., *ante*, at p. 11) and "activist" (*id.* at p. 25) "[t]he notion that a court may invalidate legislation that it finds, after a trial, to have failed to live up to expectations" (*id.* at p. 11). The majority adds that "[i]n our constitutional system, it is generally assumed that only the legislative body that enacted the statute may exercise a power of repeal if that statute fails to meet legislative expectations." (*Ibid.*) But the trial that plaintiff requests here is hardly a new idea. It is simply applying in the context of economic regulation practices that are already quite standard with respect to social and moral regulation.

As a result of our decisions interpreting the privacy clause of the state Constitution (see, e.g., *American Academy of Pediatrics* v. *Lungren* (1997) 16 Cal.4th 307 (*American Academy*); *Loder* v. *City of Glendale* (1997) 14 Cal.4th 846; *Hill* v. *National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1), social and moral regulation is routinely subject to a trial evaluating the effectiveness of the regulation at achieving its goals. In *American Academy*, for example, we stated that, "when a statute impinges upon a constitutional right, legislative findings with regard to the need for, or probable effect of, the statutory provision cannot be considered determinative for constitutional purposes." (*American Academy*, *supra*, 16 Cal.4th at pp. 349-350 (plur. opn. of George, C.J.); see also *id.* at p. 383 (conc. opn. of Kennard, J.).) Rather, "greater judicial scrutiny is required." (*Id.* at p. 349 (plur. opn. of George, C.J.); see also *id.* at p. 383 (conc. opn. of Kennard, J.); *Professional Engineers* v. *Department of Transportation* (1997) 15 Cal.4th 543, 569.) We then expressly endorsed a procedure whereby the lower court did exactly what the majority decries: it "invalidate[d] legislation that it [found], after a trial, [would] fail[] to live up to expectations" (Maj. opn., *ante*, at p. 11; see *American Academy*, *supra*, 16 Cal.4th at pp. 328-331, 354-356 (plur. opn. of George, C.J.); *id.* at pp. 360, 362-368, 377, 383 (conc. opn. of Kennard, J.).) Specifically, we concluded that the law "impinge[d] upon . . . a fundamental autonomy privacy interest" (*American Academy*, *supra*, 16 Cal.4th at p. 340 (plur. opn. of George, C.J.); see also *id.* at p. 375 (conc. opn. of Kennard, J.)) and that the Attorney General had failed to prove *at trial* that the law would serve the compelling interests that he urged in its defense (*id.* at pp. 348, 356 (plur. opn. of George, C.J.); *id.* at pp. 376, 383 (conc. opn. of Kennard, J.)). Accordingly, we agreed with the trial court that the law was unconstitutional. (*Id.* at p. 359 (plur. opn. of George, C.J.); *id.* at pp. 383-384 (conc. opn. of Kennard, J.).)

The trial plaintiff seeks in this case is no more novel than the trial we approved in *American Academy*. Indeed, under the

takings clause, the state does not face the difficult task that it faced in *American Academy* of proving that a regulation serves a compelling interest justifying an intrusion on constitutional rights. (*American Academy*, *supra*, 16 Cal.4th at pp. 340-341 (plur. opn. of George, C.J.); *id.* at pp. 376, 383 (conc. opn. of Kennard, J.).) Rather, the government will prevail so long as the regulation's purpose is legitimate and the evidence indicates it advances its purpose in some substantial way. (*Nollan*, *supra*, 483 U.S. at p. 834, fn. 3.)

Far from being "novel" (maj. opn., *ante*, at p. 11) or "activist" (*id.* at p. 25), this rule simply represents the unremarkable conclusion that, if a regulation deprives someone of private property without substantially advancing its purpose, the government should pay compensation. In most cases, an economic regulation would quite obviously advance at least one of its purposes. Injunctions prohibiting enforcement of the regulation would not issue, and litigation would come to a quick and inexpensive conclusion by way of a defense motion for summary judgment. If a case did go to trial, then the regulatory body would likely have no difficulty demonstrating the effectiveness of the economic regulation. And, if the regulatory body did have difficulty, it should be wondering about the wisdom of its apparently failed regulatory policy, not wasting its resources on litigation.

Plaintiff argues in its complaint that the Santa Monica rent control law does not substantially advance its stated purpose of helping "tenants, especially the poor, minorities, students, young families, and senior citizens" overcome "the hardship caused by [a] serious housing shortage." In support of its argument, plaintiff alleges recent demographic changes in Santa Monica that suggest the law may have failed.

If we allow this case to go to trial, plaintiff will have a difficult time proving its claims. Many factors other than rent control may have caused or contributed to the demographic changes in Santa Monica that plaintiff alleges. Rent control may

have slowed these changes and advanced its stated purposes in that way. Also, the long-term effects of rent control may not yet have fully manifested. Finally, at the very least, rent control in Santa Monica has presumably benefited tenants who were already in their apartments when it began and who have remained there. The decision to benefit one constituency over another—for example, to benefit existing tenants by preserving their low rents at the expense of prospective tenants who cannot find housing—is a policy decision that a legislative body is generally free to make. (*Schnuck* v. *City of Santa Monica* (9th Cir. 1991) 935 F.2d 171, 175.) Therefore, in order to prevail, plaintiff would have to show that benefiting existing tenants at the expense of prospective tenants is somehow inconsistent with the stated purpose of helping "tenants, especially the poor, minorities, students, young families, and senior citizens" overcome "the hardship [of a] serious housing shortage."

In sum, I share some of the majority's skepticism about plaintiff's assertions. (Maj. opn., *ante*, at pp. 19-21.) Nevertheless, on demurrer, a court must "take the properly pleaded material allegations of the complaint as true; [its] only task is to determine whether the complaint states a cause of action." (*Snyder* v. *Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 995.) Therefore, our views of the merits of plaintiff's allegations are irrelevant. Plaintiff might somehow establish, perhaps with expert opinion or empirical data, that sufficient time has passed since the introduction of rent control in Santa Monica to evaluate its long-term effects and that rent control has been the critical factor behind the demographic changes that plaintiff alleges. In addition, plaintiff might somehow further establish that "the poor, minorities, students, young families, and senior citizens" whom the authors of the law "especially" intended to benefit were more likely to be prospective tenants who have not benefited from rent control than existing tenants who presumably did benefit.

Even if we are skeptical about plaintiff's ability to prove its case, I believe it should have a chance to try. Moreover, we should not require plaintiff to prove what is tantamount to a due process violation when it has brought a takings case. Accordingly, I dissent.

CHIN, J.

DISSENTING OPINION BY BROWN, J.

Plaintiff seeks an opportunity to prove its claim that Santa Monica's rent control ordinance violates the Fifth Amendment of the United States Constitution. If the standards enunciated by the Supreme Court in *Nollan* v. *California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*) and *Dolan* v. *City of Tigard* (1994) 512 U.S. 374 (*Dolan*) apply, Santa Monica must show its ceiling on residential rents has "substantially advanced" the ordinance's legitimate aims and establish a rough proportionality between regulatory means and ends.

Out of the conviction that more than a decade of reinvigorated takings jurisprudence has changed nothing, the majority concludes the rational basis test is *still* the takings clause standard. On that basis alone, the majority refuses to grant plaintiff the chance to prove its case. According to its reasoning, not only does the takings clause *not* require Santa Monica to demonstrate a reasonable "fit" or "proportional relationship" between the ordinance's restrictions on rental property and the ends it is said to further, it is sufficient to *suppose* the ordinance "substantially advances" those ends. The Fifth Amendment, the majority decides, requires no more.

The majority is wrong. Arbitrary government actions which infringe property interests cannot be saved from constitutional infirmity by the beneficial purposes of the regulators. The framers of the takings clause sought to protect private property without regard to the decency of the government's intentions. (See Van Alstyne, *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 495.) Although the takings clause is not a guarantee of the economic status quo, it does provide a bulwark against unfairness. (Sax, *Takings and the Police Power* (1964) 74 Yale L.J. 36, 57.) It is not the fact of loss but the imposition of loss by unfair means which the takings clause seeks to prevent. (*Ibid.*)

And it is this critical assessment of fairness—variously described as "proportionality," "cost spreading," "means-ends," or "reciprocity of advantage"—which the majority declines to undertake when it invokes the rational basis test to insulate Santa Monica's rent control ordinance from challenge.

I.

THE LOGICAL LIMITS OF JUDICIAL DEFERENCE

Judicial review is properly conceived in narrow terms. It is not a license to supersede the exercise of power by a coordinate branch which acts well within constitutional boundaries. Thus, I agree with the majority that it is generally improper for us to put legislation on trial. (Maj. opn., *ante*, at pp. 11, 25.) "[T]he proper course is to recognize that a [legislative body] can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."[12] (*Tyson & Brother* v. *Banton*

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[12] I strongly disagree with the aggressive notion of appropriate judicial review espoused by one of my dissenting colleagues. He notes the plurality in *American Academy of Pediatrics* v. *Lungren* (1997) 16 Cal.4th 307, "expressly endorsed a procedure whereby the lower court did exactly what the majority [here] decries: it 'invalidate[d] legislation that it [found], after a trial, [would] fail[] to live up to expectations.'" (Dis. opn. of Chin, J., *ante*, at p. 6.)

In my view, this "procedure" improperly usurped legislative power and injected the court into an area in which it could claim no competence. A trial may be a crucible for finding truth, i.e., determining what particular facts occurred in a particular case, but it is not a crucible for revealing "The

(continued...)

(1927) 273 U.S. 418, 446 (dis. opn. of Holmes, J.).) As even the majority acknowledges, however, there are "circumstances in which some greater degree of judicial scrutiny . . . is appropriate," particularly when "fundamental constitutional rights [are] at stake." (Maj. opn., *ante*, at p. 25, fn. 4.)

The majority's call to deference thus rests on an unspoken and critical assumption: that property merits only an inferior level of protection. That conclusion, a historical artifact

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(...continued)
Truth." "[I]n matters of normative judgment, no court should be in the position to supplant society's collective understanding, distilled through experience and expressed in legislative enactments, on the basis of the evidence presented in a single case. . . . [¶] When fundamentally moral and philosophical issues are involved and the questions are fairly debatable, the judgment call belongs to the Legislature." (*American Academy of Pediatrics* v. *Lungren*, *supra*, 16 Cal.4th at pp. 446-447 (dis. opn. of Brown, J.).)

of the demise of the *Lochner* era,[13] has no defensible constitutional provenance.

Under the Fifth Amendment of the United States Constitution no person may be "deprived of life, liberty, or property without due process of law" and private property may not be "taken for public use without just compensation." The Fourteenth Amendment contains a virtually identical clause. (Cf. Cal. Const., art. I, § 7.)

Nothing in the text or structure of either provision suggests an infringement of a property interest ought to be accorded greater deference than a restriction on a liberty interest. Economic freedoms are no different than other freedoms protected by the Constitution. "[I]t would have seemed a strange

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[13] *Lochner* (*Lochner* v. *New York* (1905) 198 U.S. 45) is the name that has come to symbolize judicial usurpation of power. But the problem with *Lochner* was not that it sought to make judicial review meaningful or that it deemed economic interests worthy of protection. The *Lochner* court was justly criticized for using the due process clause "as though it provided a blank check to alter the meaning of the Constitution as written." (*Harper* v. *Virginia Bd. of Elections* (1966) 383 U.S. 663, 675.) The "revolution of 1937" ended the era of economic substantive due process but it did not dampen the court's penchant for rewriting the Constitution. Although the court left the protection of property interests largely to the mercy of legislatures, it continued to apply substantive due process to the protection of civil liberties. "As several of the Justices have noted in dissent, there is only a verbal difference between the 'fundamental rights' branch of the compelling governmental interest test and the now discredited substantive due process doctrine of such cases as *Lochner*. . . . Both of them leave the Court entirely at large, with full freedom to enact its own natural law conceptions. The only difference is in the type of interests that are protected . . . ." (Lusky, *By What Right?* (1975) p. 266, fns. omitted.)

anomaly to those who penned the words in the Fifth [Amendment] to learn that they constituted severer restrictions as to Liberty than Property . . . . I can see no persuasive reason for supposing that a legislature is *a priori* less qualified to choose between 'personal' than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second." (Hand, *The Bill of Rights* (1958) pp. 50-51; see also *Dolan*, *supra*, 512 U.S. at p. 392 ["We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."].)

I, too, find the dichotomy inexplicable. (See *Board of Education* v. *Barnette* (1943) 319 U.S. 624, 648 (per Jackson, J.) ["The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another. . . . Our power does not vary according to the particular provision of the Bill of Rights which is invoked."].)

Indeed, the ownership of property is itself an aspect of liberty. "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924) . . . ." (*Lynch* v. *Household Finance Corp.* (1972) 405 U.S. 538, 552.)

Nevertheless, in the aftermath of *Lochner* and its progeny, the federal high court articulated such a hierarchy, relegating economic rights to a decidedly inferior status. This has resulted in a judicial review not merely deferential but actually nonexistent. The rational basis test—a standard of

review which allows legislative action to stand if the court can hypothesize any perfunctory justification for it—is as bad in its own way as substantive due process. Neither approach finds support in the constitutional text.

II.

THE REVIVAL OF MEANINGFUL REVIEW

In the takings arena, at least, the high court has moved to reclaim some of the ceded territory by imposing a heightened level of scrutiny. There are traces in *Nollan* suggesting a renewed appreciation of the connection between liberty and property. The majority insists this is no more than rational basis by another name, requiring the party challenging a rent control ordinance to show "'it constitutes an arbitrary regulation of property rights.'" (Maj. opn., *ante*, at p. 17, quoting *Dolan*, *supra*, 512 U.S. at p. 391, fn. 8.) Wrong.

The practical meaning of *Nollan* is the court's statement that "land-use regulation does not effect a taking if it '*substantially advance[s]* legitimate state interests' . . . ." (483 U.S. at p. 834, italics added.) That statement describes a *relational* formula, one requiring judges deciding claims under the takings clause to scrutinize the connection or "fit" between property restraints and the ends they purportedly further. The relation is more than one of logic, however, more than a naked "rational" connection between means and ends. It tests both the utility *and* the proportionality of government-imposed restraints on property. And it challenges government to justify the means chosen to further a particular end by asking two questions.

First, *how* does a particular limitation advance the ends the government asserts it furthers? Second, is the restraint "tailored" (in the language of equal protection) or "proportional" (in the language of the takings clause) to the end the government asserts is promoted? The inquiry is "equitable" in the chancery's traditional sense. Regulators whose land use restraints are challenged as takings are required to do more than

speculate that a given restraint might conceivably advance a legitimate governmental end. They must substantiate, if only "roughly," a factually grounded, proportional relationship between property restraints and the goals they purportedly further.

Although the majority argues strenuously that these governing precedents must be narrowly limited to their facts, there is no basis in *Nollan* for concluding different tests apply to different kinds of regulatory takings, i.e., permit exactions but not legislative enactments. (*Manocherian* v. *Lennox Hills Hosp.* (1994) 84 N.Y.2d 385 [643 N.E.2d 479, 483]; see *Trimen Development Co.* v. *King County* (Wn. 1994) 877 P.2d 187.) Why should the existence of a taking turn on the type of governmental entity responsible for the taking? For constitutional purposes, a taking is a taking. Some takings—physical seizures and regulations which deprive the owner of all economically viable use—are compensable per se; takings claims that fall outside those narrow categories are subject to heightened scrutiny—"a uniform, clear and reasonably definitive standard of review in takings cases." (*Manocherian*, *supra*, 643 N.E.2d at p. 483.) Indeed, the dissent in *Nollan* complained that the majority's rationale would impact all regulatory takings cases and noted the court's "exactitude" was inconsistent with its prior standard for reviewing the rationality of a state's exercise of its police power. (*Ibid.*, quoting *Nollan*, *supra*, 483 U.S. at pp. 842-843 (dis. opn. of Brennan, J.).)

As Gerald Gunther has pointed out, the legitimacy of means-focused scrutiny is as old as the Constitution itself. It requires courts to "take seriously a constitutional requirement that has never been formally abandoned: that legislative *means must substantially further* legislative *ends*. . . . The core of that principle survived the constitutional revolution of 1937." (Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* (1972) 86 Harv. L.Rev. 1, 20-21, italics added (*Evolving Doctrine*).)

Two features of *Nollan* bear directly on the question of the intensity of means scrutiny as applied to land use regulatory restraints. Unlike the rational basis standard, which forswears genuine evidentiary burdens on the government, *Nollan* contemplates a factual defense in support of the claim that a given regulatory restraint *actually* promotes specific ends. Professor Gunther has described the nature of the government's burden this way: "[Means scrutiny] requires that there be an affirmative relation between means and ends . . . . The model would have the Court assess the [government's] justification . . . largely in terms of information presented by the defenders of the law rather than hypothesizing data of its own." (*Evolving Doctrine*, *supra*, 86 Harv. L.Rev. at p. 47.)

What does *Nollan*'s "means scrutiny" amount to in the larger context of constitutionally permissible property restraints? Most notably, the *Nollan* standard is *non*-substantive. It has no concern, strict or permissive, with the validity of legislative *ends*. Nor does it require land use regulators to demonstrate a "compelling interest" (or any interest) to justify them. Those are substantive matters left to political decisionmaking and legislative competence. And because it is means-focused, the *Nollan* test is instrumental, examining the utility of specific limitations regulators have chosen as furthering articulable ends, rather than the merits of the ends themselves.

III.

Fairness, Proportion, And The Limits Of Democratic Process

Although the constitutional compensation requirement is considered a necessary restraint on the despotic exercise of absolute, arbitrary, and uncontrollable government power (Story, *Commentaries on the Constitution of the United States* (1987) § 933, pp. 663-664; *Chicago, Burlington &c. R.D. Co.* v. *Chicago* (1897) 166 U.S. 226, 237), courts have prudently recognized the takings clause "cannot be pressed to its

grammatical extreme . . . ." (*Tyson & Brother* v. *Banton*, *supra*, 273 U.S. at p. 446 (dis. opn. of Holmes, J.).) There must be, in Justice Holmes's descriptive phrase, "some play . . . to the joints" for the machinery of government to work. (*Ibid.*; see *Penna. Coal Co.* v. *Mahon* (1922) 260 U.S. 393, 412-416.)

"[G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property." (*Andrus* v. *Allard* (1979) 444 U.S. 51, 65.) The constitutional guarantee against uncompensated takings is not violated by every adjustment of the benefits and burdens of economic life, but it is contravened when the adjustment is clearly disproportionate, "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong* v. *United States* (1960) 364 U.S. 40, 49.) It is this elementary notion—that the takings clause embodies a fundamental principle of fairness in the distribution of economic burdens—that the *Nollan/Dolan* matrix seeks to effectuate. In the context of regulatory takings, the means-ends test allows a rough approximation of where government action falls along a continuum ranging from clearly permissible general adjustments, those that "secure[] an average reciprocity of advantage," as Justice Holmes described them (*Penna. Coal Co.* v. *Mahon*, *supra*, 260 U.S. at p. 415), to unconstitutional predatory or rent-seeking exactions.

In his concurring and dissenting opinion in *Pennell* v. *San Jose* (1988) 485 U.S. 1, 15, Justice Scalia illustrated this means-ends relationship. That case involved due process, equal protection and takings clause challenges by landlords to the San Jose rent control ordinance. A majority of the court refused to decide the takings claim on the ground "it would be premature to consider this contention on the present record." (*Id.* at p. 9.) But in his separate opinion, Justice Scalia addressed the takings clause claim. Because one of the provisions of the San Jose ordinance used to fix residential rent ceilings included a "tenant

hardship" factor, the ordinance, according to Justice Scalia, had the effect of requiring landlords to subsidize those tenants unable to pay market rents. That consequence, Justice Scalia wrote, violated the takings clause: "The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public . . . through taxes . . . . Unless we are to abandon the guiding principle of the Takings Clause that . . . is the only manner that our Constitution permits." (*Pennell* v. *City of San Jose*, *supra*, 485 U.S. at pp. 21-22 (conc. and dis. opn. of Scalia, J.).)

No provision of the Santa Monica rent control ordinance resembles the "tenant hardship" feature of the ordinance in *Pennell*. But Justice Scalia's point—that the hardship factor violated the takings clause by arbitrarily transferring value from one (landlords) to another (tenants unable to pay rent)—is no different in principle from the effect of *any* rent control measure. All such redistributive schemes involve an implicit subsidy of tenants by property owners, a subsidy by which value is taken from one and given to another.

It is not the transfer of value that is constitutionally suspect; it is the *distributive inequality of the means* by which it is effected. If the core principle underlying the takings clause is that "public burdens . . . should be borne by the public as a whole," (*Armstrong* v. *United States* (1960) 364 U.S. at p. 49) that principle is arguably violated by *all* rent control schemes. Instead of raising the sums necessary to provide subsidies to qualified renters through a general public tax—the "traditional manner" by which public subsidies have been raised—rent control singles out a small segment of the public, owners of residential rental property, to bear the entire cost. The effect is to "load[] upon one individual more than his just share of the burdens of government" and to require that "he surrender[] to the public something more and different from that which is

exacted from other members of the public . . . ." (*Monongahela Navigat'n Co.* v. *United States* (1893) 148 U.S. 312, 325.)[14]

There is a troubling political feature to rent control as well, one also underlined in Justice Scalia's separate opinion in *Pennell*. (485 U.S. at pp. 20-23.) "The politically attractive feature of [rent control] is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved 'off budget,' with relative invisibility and . . . relative immunity from . . . democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues . . . to pay part of the rents of 'hardship' tenants . . . . Subsidies for . . . groups [e.g., senior citizens, students, the handicapped, or war veterans] may well be a good idea, but because of the . . . Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident." (*Id.* at pp. 22-23 (conc. and dis. opn. of Scalia, J.); cf. *Prop. Owners Ass'n., etc.* v. *TP. of No. Bergen* (N.J. 1977) 378 A.2d 25, 31 ["compelled [rent] subsidization by landlords or by tenants who happen to live in an apartment building with [low income] senior citizens" held unconstitutional as confiscatory].)

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[14] The author of today's majority opinion dissented in *Pennell* v. *City of San Jose* (1986) 42 Cal.3d 365. His views reflected the same *Armstrong*-like theme of distributive unfairness as Justice Scalia's dissent: "[T]he issue is whether [the] obligation [of satisfying the housing needs of those with low incomes] can be thrust upon private property owners rather than remain a responsibility of society as a whole through tax-supported government agencies . . . . I am convinced [San Jose's] scheme is unconstitutional." (*Pennell* v. *City of San Jose*, *supra*, 42 Cal.3d at pp. 375-376 (dis. opn. of Mosk, J.).)

The politics of rent control are not confined to "invisible" regulations. Santa Monica's program was approved by a majority of the city's voters. Does that "democratic" feature eliminate the concerns Justice Scalia expressed in *Pennell*? Would overwhelming voter approval of a proposal to confiscate the assets of a local (and unpopular) religious sect survive constitutional scrutiny? In American constitutional discourse, such questions lack legitimacy; they neither require nor deserve a response: The "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (*Board of Education* v. *Barnette*, *supra*, 319 U.S. at p. 638 (per Jackson, J.).) The difficulty with such distributive schemes is not, to borrow from Alexander Bickel, the "counter-majoritarian difficulty," it is the *majoritarian* difficulty itself. (Cf. Bickel, *The Least Dangerous Branch* (2d ed. 1986) pp. 16-23.) Along with other provisions of the national Constitution, the takings clause stands as a bulwark against confiscatory acts by a majority.

Nor are the social effects of an unprincipled majoritarianism difficult to discern. As Justice Scalia's dissent in *Pennell* suggests, it is not likely that a majority of voters would approve publicly financed rent control; if, that is, *voters* had to pay the cost. Of course, *someone* must pay the substantial cost of rent ceilings. When those costs are paid by rental property owners through government compulsion, however, it is impossible to measure the intensity of public support for rent subsidies. A majority is thus able to impose ceilings on rents while, at the same time, shifting their cost from the public to a small minority—owners of rental property. Thus, *Nollan*'s proportionate impact requirement "does more than distribute the costs of government programs. It has the desirable allocative consequence of reducing the frequency of

undesirable government programs in the first instance. . . ." (Epstein, *Rent Control and the Theory of Efficient Regulation* (1988) 54 Brooklyn L.Rev. 741, 755; see also Nozick, *Anarchy, State and Utopia* (1974) pp. 270-271 ["So why do people find the subletting-allowed scheme [of rent control] unacceptable? It[s] defect is that it makes explicit the partial expropriation of the owner."].)

The fact that the state has acted through "the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation' which can disproportionately burden particular individuals." (*Pennell* v. *San Jose, supra,* 485 U.S. at p. 22 (conc. and dis. opn. of Scalia, J.).) The key to the takings clause is fairness, and the imposition of loss by unfair means is what the clause seeks to prevent. Thus, "just compensation" like the notion of "just price" contains a subtext of reciprocity. The "substantially advance" test is just a way of measuring whether the benefit and burden are relatively equal. If they are, compensation is not required. Where government can demonstrate a close, and proportional, match between means and ends, i.e., a "proportional nexus," the impact of the regulation is necessarily small, the burden offset by the benefit, and the interference spread over the general population. Where the connection between the regulation and its purported ends is both indirect and conjectural, or clearly disproportionate, fairness and justice require that compensation be paid. (*Dolan, supra*, 512 U.S. at p. 391; *Nollan, supra*, 483 U.S. at p. 865.)

Instead of attempting to measure the actual fit between the city's rent ceiling and its fact-based justifications for the ordinance, the majority applies an enfeebled rational basis standard, and contents itself with supposing that some generalized conception of the public good might be promoted by the means chosen. But a laissez-faire attitude toward takings claims is no longer good enough. The United States Supreme

Court's precedents appear to establish a minimal level of protection which this court lacks authority to diminish.

Indeed, even on its own terms, today's decision is anomalous. In effect, the majority concedes the ordinance does not further its stated goal of "providing affordable housing for the poor, the elderly and young families" (maj. opn., *ante*, at pp. 20-22) by quoting approvingly from the *due process* analysis of *Schnuck* v. *City of Santa Monica* (9th Cir. 1991) 935 F.2d 171, 175 (*Schnuck*): "[Plaintiff] contends that the Rent Control Law does not 'substantially advance' its purpose, which she misperceives as only to help the poor, elderly, minorities, and families with children. The Rent Control Law's stated purpose is to help all Santa Monica tenants, not just those within the mentioned groups, and not those who wish to become tenants there. [Citation.] Controlling rents to a reasonable level and limiting evictions substantially alleviates hardships to Santa Monica tenants. That rent control may unduly disadvantage others, or that it may exert adverse long-term effects on the housing market, are matters for political argument and resolution; they do not affect the constitutionality of the Rent Control Law." (Fns. omitted; see maj. opn., *ante*, at p. 20.) But these are precisely the concerns which affect the constitutionality of the ordinance under the takings clause.

The *Schnuck* court declined to consider the regulatory takings claim because the plaintiff, who objected to the ordinance as applied, had not sought compensation through an inverse condemnation action. (*Schnuck*, *supra*, 935 F.2d at pp. 173-174.) The case certainly cannot be cited for the proposition that such a broad statement of purpose ("to help all Santa Monica tenants") would survive a challenge under the takings clause. Moreover, in a case decided after *Schnuck*, the high court left no doubt that the "substantially advance" test is properly applied to regulatory takings claims. (See *Yee* v. *Escondido* (1992) 503 U.S. 519, 534 [petitioners "allege in this Court that the ordinance does not ""substantially advance"" a

"'legitimate state interest'" no matter how it is applied. See *Nollan* v. *California Coastal Comm'n*, *supra*, at 834; *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980)."]

Regulatory takings claims implicate both prongs of the Fifth Amendment. To survive a takings challenge, the government's actions must substantially advance narrowly tailored goals. Conversely, to defend broadly defined exercises of the police power, the government must show that general public burdens are not being imposed arbitrarily or in a discriminatory fashion. The "substantially advance" test thus *assumes* the legitimacy of the state's interest. But the legitimacy and validity of that interest is always open to a challenge under the due process clause. In this case, if Santa Monica's goal under the ordinance may be broadly defined as assisting all tenants, then landlords can be compelled to subsidize those who are better off than they are and to subordinate their priorities to the priorities of all their tenants. The plaintiff in *Schnuck*, for example, was an elderly widow who owned an eight-unit apartment building subject to the Santa Monica rent control ordinance. She lived in a third-floor apartment and rented the other units. After suffering a stroke, she wanted to move to the first-floor apartment in order to avoid having to climb the stairs. The first-floor tenant refused to move, however, and the rent control board informed Schnuck that the tenant could not be evicted. (*Schnuck*, *supra*, 935 F.2d at p. 172.) How can such an arbitrary and despotic regime be justified as a proper exercise of the police power—even under the less exacting standards of the due process clause?

Concurring in *Railway Express* v. *New York* (1949) 336 U.S. 106, Justice Jackson wrote that the "framers of the constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to

arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." (*Id.* at p. 113.) Justice Jackson was discussing the equal protection clause, but as Professor Gunther has pointed out, imposing a minimally rational means-ends test, whether under the due process and equal protection clauses or the "substantially advance" standard of the takings clause would help "to assure rationality of means, without unduly impinging on legislative prerogatives regarding ends." (Evolving Doctrine, *supra*, 86 Harv. L.Rev. at p. 23.)

CONCLUSION

The majority's assertion that "the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply in this case" (maj. opn., *ante*, at p. 17) is more wish than fact. Rent control measures have been upheld by the United States Supreme Court under circumstances easily distinguished from those present here. Controls have been sustained as either short-term "emergency" measures (e.g., *Block* v. *Hirsh* (1921) 256 U.S. 135 [war powers clause]) or against challenges under the *due process* clause, a quite dissimilar standard. (See, e.g., *Pennell* v. *San Jose*, *supra*, 485 U.S. at pp. 11-13; see also *Nollan*, *supra*, 483 U.S. at pp. 834-835, fn. 3.) In light of the history of due process economic standards discussed above, these cases provide no basis for assuming such controls will survive *Nollan*'s means scrutiny under the just compensation clause. Indications are to the contrary (compare *Chastleton* v. *Sinclair* (1924) 264 U.S. 543 with *Nollan*, *supra*, 483 U.S. 825), and the question remains an open one. If such measures are capable of withstanding a *Nollan*-inspired takings clause analysis, the high court ought to tell us so, preferably sooner rather than later.

Until that day, I dissent.

BROWN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Unpublished Opinion

Original Appeal

Original Proceeding

Review Granted XXX 47 Cal.App.4th 120

Rehearing Granted

Opinion No. S052824

Date Filed: January 4, 1999

Court: Superior

County: Los Angeles

Judge: Alan B. Haber

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APPENDIX B

Filed 3/20/96

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

As Modified on Denial of Rehearing March 20, 1996.
Review Granted May 29, 1996.

SANTA MONICA BEACH, LTD., Petitioner, v. The SUPERIOR COURT of Los Angeles County, Respondent, SANTA MONICA RENT CONTROL BOARD, Real Party in Interest.	B097056 (Super. Ct. No. SS005266)

ORIGINAL PROCEEDING; application for writ of mandate, Alan B. Haber, Judge. Writ granted.

Pacific Legal Foundation, James S. Burling, R.S. Radford and Victor J. Wolski, Sacramento, for Petitioner.

No appearance for Respondent.

Anthony A. Trendacosta, General Counsel, Los Angeles, and Ralph H. Goldsen, Staff Attorney, San Francisco, for Real Party in Interest.

MIRIAM A. VOGEL, Associate Justice.

Santa Monica Beach, Ltd. (SMB) filed a combined complaint for inverse condemnation and petition for a writ of administrative mandate, naming the Santa Monica Rent Control Board as defendant and respondent and contending that, as applied to SMB, the City of Santa Monica's rent control law constitutes a compensable regulatory taking of SMB's property. The Board demurred, contending that, as a matter of law, SMB could not prevail on its inverse condemnation claim because there was a "rational basis" for the taking (that is, for the limits imposed by the rent control law). The trial court agreed and sustained the demurrer without leave to amend, leaving the administrative mandate petition to be heard at a later date. Because the two claims are inextricably related, SMB thereupon filed a petition for a writ of mandate, and we issued an order to show cause.

For the reasons explained below, we conclude that the question is not one that can be decided by way of a demurrer--but that when it is properly before the trial court, the question is not whether there was a "rational basis" for the legislative enactment. Instead, the question is whether the statute "goes too far," which it does if (1) it denies an owner the economically viable use of its land without (2) substantially advancing a (3) reasonably necessary and (4) legitimate state interest, factors determined by the trial court's consideration of (a) the economic impact of the regulation on the owner, (b) the extent of the interference with the owner's reasonable investment-backed expectations, (c) the character and nature of the regulation, (d) the extent (if any) to which the owner benefits from the

regulation, and (e) the nature and importance of the public interests which the regulation serves.

BACKGROUND[1]

A.

In April 1979, the City of Santa Monica adopted a rent control charter amendment and created an elected Rent Control Board to regulate rentals. Among other things, the City's rent control law requires that owners register each rental unit and pay annual registration fees to the Board, establishes maximum allowable rents, provides for annual general adjustments and individual adjustments of allowable rents, prohibits evictions except for specified reasons, and prescribes remedies for violations of its provisions. This was the stated purpose of the charter amendment: "A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. *These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens.* The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return." (Emphasis added.)

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[1] As always, on review of the propriety of a ruling on a demurrer, we presume the truth of the complaint's properly pleaded facts. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125, 271 Cal.Rptr. 146, 793 P.2d 479.) Statements of fact within quotation marks are taken from SMB's first amended complaint.

Between 1980 and 1990, during which time the City's rent control law was continuously in effect, the City's stock of rental housing units declined by nearly 5 percent and the City experienced a loss of 775 low-income rental units (a 12 percent decline) notwithstanding that, during the same period, the rental housing supply and the number of low-income rental units *increased* in all comparable non-rent-controlled Southern California cities. The City also lost 285 "very low-income" rental units, the largest "exodus of economically disadvantaged renters" from *any* comparable Southern California city. At the same time, the City experienced a 37 percent *increase* in the proportion of households with very high incomes (while the proportion of very high-income households *dropped* by more than 8 percent in Los Angeles County as a whole). In addition, rental housing in Santa Monica has become "increasingly unavailable" to young families, with the number of family households with children declining by 1,299, a 6 percent drop during a period when no comparable non-rent-controlled Southern California city lost young family households.

"The impact of rent control has been especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under 18 in Santa Monica fell by 593 between 1980 and 1990, a decrease of more than 27 [percent], despite an *increase* in such households in Los Angeles County as a whole. [¶] Under rent control, Santa Monica's elderly population (aged 65 and over) declined by 1.7 [percent] between 1980 and 1990. This decrease is especially remarkable because the elderly population of Los Angeles County *rose* by more than 15 [percent] over the same decade. The elderly population increased over this period in every comparable [Southern California] city without rental control...."

In short, SMB alleges, Santa Monica's rent control law has failed to mitigate the effects of "a growing shortage of housing units" by assisting "the poor, minorities, students, young

families and senior citizens" and, to the contrary, it has made things worse.B.

In March 1992, SMB (the owner of a 12-unit residential rental property in the City of Santa Monica) filed a petition asking the Board for permission to increase its rents. To prevail, SMB had to prove that its property was producing less than a "fair return" under "a comparative Net Operating Income (NOI) analysis that compares the NOI of calendar year 1978 to that of calendar year 1991, the most recent year prior to the filing of" SMB's 1992 petition. In May, after an administrative hearing, the Board's hearing examiner found that SMB's operating expenses for the base year of 1978 were $14,879 but that SMB was not entitled to a rent increase. SMB appealed to the Board, without success.

While SMB's 1992 petition was pending, three things happened. First, SMB (along with all Santa Monica landlords covered by the City's rent control law) became entitled to a "full general rent adjustment" effective September 1, 1992. Second, the Board modified its regulations so that, in the future (but not retroactively), a landlord's operating expenses could be calculated by separating insurance costs from other administrative management costs. Third, the Board "extensively modified" Regulation 4108 which, as originally adopted, had *temporarily delayed* implementation of general rent adjustments in cases where owners received large rent increases. The revised Regulation 4108, as adopted on June 3, 1992, *permanently denies* up to one year of future general rent adjustments in the event an owner is entitled to *any* rent increase, no matter how small the amount.

On March 30, 1993, SMB filed a second petition with the Board, this time asking for permission to increase its rents based upon its income and expenses for 1992. A hearing examiner found that SMB was entitled "to a permanent rent increase of $3 per unit per month and temporary rent increases averaging

$58 per unit per month." SMB appealed to the Board, contending (1) the hearing officer had improperly considered income from parking spaces rented separately from SMB's apartments (parking spaces are not covered by the City's rent control law), (2) the hearing examiner's determinations were contrary to the determinations made by the hearing examiner who heard SMB's 1992 petition, and (3) the hearing examiner improperly applied Regulation 4108 to reduce SMB's rent increase entitlement based on SMB's 1992 NOI and to permanently deny SMB three-fourths of the general rent adjustment to be implemented in 1993 and 1994. The Board affirmed the hearing examiner's determinations.

Based upon these allegations, SMB claims the Board has, by application of the City's rent control law, violated SMB's Fifth Amendment rights under the United States Constitution and its rights under article I, section 19 of the California Constitution (the takings clauses). Specifically, SMB claims the City's rent control law does not meet the "substantial advancement" test articulated in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 834-837, 107 S.Ct. 3141, 3147-3148, 97 L.Ed.2d 677 (discussed at length below), because the rent control law fails "to substantially mitigate some social harm that would otherwise result from the [property] owner's unregulated use of [its] property" and by "fail[ing] in practice to advance the specific purpose stated in the regulation."

In its cause of action for inverse condemnation, SMB then alleges: "Because [the Board's] application of the [rent control law] has reduced the availability of private rental housing in Santa Monica and has made it more difficult for low-income renters, young families, and the elderly to find affordable rental housing, the [rent control law] is not substantially advancing its stated purpose of implementing the housing policies of the [C]ity with regard to these population groups. [¶] The ... Board's final determination regarding [SMB's 1993 petition] does not substantially advance a legitimate governmental interest, nor is

there any close nexus between the denial of [SMB's] application for a fair rate of return on capital investments and any public harm that might result from [SMB's] unregulated operation of [its] property, because unregulated use of [its] property by [SMB] would not have resulted in the problems allegedly addressed by the [rent control law], i.e., a shortage of available housing for low-income renters, young families, and the elderly."

Additional allegations within the inverse condemnation cause of action charge the Board with denying SMB a fair return on its investment and depriving SMB of "essential attributes of ownership of its property, including the right to exclude others and the right to determine the terms upon which leasehold interests in [SMB's] property will be alienated." SMB "has received no compensation for the damages inflicted by [the City's] application of the [rent control law] to [SMB's] property, and the [rent control law] contains no provision for seeking or obtaining compensation."

For each and all of these reasons, SMB alleges, the Board's application of the City's rent control law to SMB's property "comprises a regulatory taking of [SMB's] property for public use without just compensation.... [¶] A trial de novo is necessary to examine the constitutional issues in this case. The administrative record compiled by the Rent Board is inadequate for this purpose because the Rent Board does not conduct the kind of judicial proceedings needed to safeguard [SMB's] fundamental right to due process of law or its right not to be deprived of its property without just compensation...."[2]

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[2] As noted at the outset, SMB's complaint is combined with a petition for a writ of administrative mandate. That cause of action (which is not before us at this time) alleges with specificity that the Board acted without or in excess of its jurisdiction in denying SMB's request for permission to increase its rents.

C.

The Board demurred to SMB's inverse condemnation cause of action, contending (among other things) that the rent control law need not "substantially advance" the stated purpose of the law and that where, as here, a regulatory taking is alleged, this "heightened scrutiny" is not required. Moreover, claimed the Board, an inverse condemnation claim cannot be based upon a "temporary regulatory diminution of income or value." In short, the Board's position was (and is) that, as a matter of law, SMB has no right to claim damages on an inverse condemnation theory.

The trial court accepted the Board's position and sustained the demurrer without leave to amend because "the rational basis test applies to regulatory takings." An order dismissing SMB's inverse condemnation cause of action was thereafter signed and filed, leaving SMB with its petition for administrative mandate still to be determined. Because the two claims are inextricably related, SMB asked us to intervene and review the trial court's ruling at this stage of the proceedings. We agreed and issued an order to show cause, to which the Board has responded. For the reasons we will now explain, we grant the writ as prayed.

I

DISCUSSION

We begin by stating the obvious. *First,* all it takes to plead a cause of action for inverse condemnation are allegations of (1) the plaintiff's ownership of described property, (2) a governmental taking by actual possession or by regulation, and (3) substantial damage to the plaintiff's property. (5 Witkin, Cal.Procedure (3d ed. 1985) Pleading, § 641, pp. 91-92.) *Second,* where (as here) the existence of a regulatory taking has not previously been judicially determined, an action for inverse condemnation is properly joined with a petition for a writ of administrative mandate. (*Hensler v. City of Glendale* (1994)

8 Cal.4th 1, 7, 13-16, 32 Cal.Rptr.2d 244, 876 P.2d 1043.)[3] *Third*, by its demurrer, the Board has conceded (for present purposes) the truth of SMB's factual allegations and we therefore presume there has, in fact, been a regulatory taking of SMB's property, the extent of which remains to be determined at trial. (*Moore v. Regents of University of California, supra,*

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[3] Aside from potential problems created by the applicable statute of limitations (as in *Hensler v. City of Glendale, supra*, 8 Cal.4th at pp. 21-28, 32 Cal.Rptr.2d 244, 876 P.2d 1043), the property owner has the option of filing his administrative mandate petition first and then, if he prevails, pursuing his inverse condemnation claim in a separate action. For example, in *Kavanau v. Santa Monica Rent Control Bd.* (1993) 19 Cal.App.4th 730, 23 Cal.Rptr.2d 724, we held that an apartment owner's petition for writ of mandate should have been granted on the ground that Santa Monica's rent control law, as applied to Mr. Kavanau, unconstitutionally deprived him of a fair return. Assuming that Mr. Kavanau timely pursued a claim for inverse condemnation in a separate action, the trial court would then have before it a case in which a taking was already determined in a judicial proceeding and the only remaining issues would be whether that taking was the result of a regulation which did not meet the standards articulated in this opinion and, if it did not, the amount of damages to which Mr. Kavanau is entitled. (*Hensler v. City of Glendale, supra*, 8 Cal.4th at pp. 13-17, 32 Cal.Rptr.2d 244, 876 P.2d 1043 [a regulatory taking may be challenged by declaratory relief or by a petition for a writ of administrative mandate, either of which may be joined with or followed by an action for inverse condemnation]; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal. App.4th 592, 607, 11 Cal.Rptr.2d 824 [where an inverse condemnation action is based upon a regulatory taking accomplished by a discretionary action of an administrative agency, "the proper procedure is to bring the inverse condemnation action in conjunction with, or after, a petition for administrative mandamus, . . . the procedure generally required when the validity or propriety of an action or determination by an administrative agency is challenged"]; *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1170, 27 Cal.Rptr.2d 758.)

51 Cal.3d at p. 125, 271 Cal.Rptr. 146, 793 P.2d 479; *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1043, 281 Cal. Rptr. 640 [in ruling on a demurrer, the trial court is prohibited from considering whether the plaintiff will be able to prove its claim or the difficulty it may have in doing so].) *Fourth*, a partial or temporary regulatory taking is still a "taking" which will support an inverse condemnation claim. (*First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250; *Healing v. California Coastal Com., supra,* 22 Cal.App.4th at p. 1171, 27 Cal.Rptr.2d 758.)

For these reasons, it is clear the demurrer was improperly sustained. In short, the question whether the facts alleged by SMB are sufficient to establish the sort of regulatory taking which will entitle it to damages on an inverse condemnation theory was not something the trial court could or should have answered at this stage of the proceedings.

II.

Since the trial court's comments (as well as its ruling) reflect its uncertainty about the standard ultimately to be applied in this case, and since we have the issue squarely before us and fully briefed by both sides, we have concluded that this is an appropriate stage of these proceedings at which to address the merits of this issue.

A.

To the extent the Board contends that not every governmental regulation supports a taking claim, it is correct. To the extent it contends that all that is required is some vague, unarticulated rational connection between the regulation and the limitation on a property owner's rights vis-a-vis its property, the Board is wrong. If SMB can prove that Santa Monica's rent control law "goes too far" in the manner explained below, SMB will have established the "taking" element of its inverse

condemnation cause of action--notwithstanding that the City may be able to show that there was a "rational basis" for the law when it was adopted.

B.

As our Supreme Court explained in *Hensler v. City of Glendale, supra,* 8 Cal.4th at pp. 9-10, 32 Cal.Rptr.2d 244, 876 P.2d 1043 (quoting *Yee v. Escondido* (1992) 503 U.S. 519, 522-523, 112 S.Ct. 1522, 1526, 118 L.Ed.2d 153), a regulatory taking differs from the classic physical invasion of private property that historically formed the basis of an inverse condemnation claim: " 'Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. [Citation.] But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.'"[4]

Where (as in our case) the inverse condemnation claim is based upon a regulatory taking, "[a]n individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in

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[4] As the Supreme Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868, there are really three categories of takings: (1) an outright physical taking (e.g., flooding, destruction or physical occupation by government); (2) physical taking by regulation (e.g., regulatory measures authorizing permanent physical use of property by third parties); and (3) pure regulatory takings (i.e., regulations prohibiting or requiring certain uses of property by its owner). The first two categories always require compensation. As we will explain, the determination whether the third category constitutes a compensable taking depends on the facts of each case.

determining whether a regulatory restriction on property use constitutes a compensable taking." (*Hensler v. City of Glendale, supra,* 8 Cal.4th at p. 10, 32 Cal.Rptr.2d 244, 876 P.2d 1043.) In short, the determination whether a regulatory taking is compensable is fact-driven and must be decided on a case by case basis. (*Id.* at p. 12, 32 Cal.Rptr.2d 244, 876 P.2d 1043 [compensation need not be paid unless the regulation fails to serve an important governmental purpose or goes too far as applied to specific property]; *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 [while property may be regulated to a certain extent, if the regulation "goes too far" it will be recognized as a taking]; see also *MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348, 106 S.Ct. 2561, 2565, 91 L.Ed.2d 285 [a court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes].)

C.

How do we determine whether a regulation "goes too far?"[5] We know that it does *not* go too far if it "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 834, 107 S.Ct. at p. 3147, citing *Agins v. Tiburon* (1980) 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106.) Conversely, we know that it *does* go too

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[5] The Supreme Court did not consider this issue in *Hensler.* There, the distinction between possessory and regulatory takings was necessary to determine the nature of the plaintiff's claim, a prerequisite to the determination of the time at which the applicable statute of limitations runs when the challenge is to the facial validity of a land-use regulation (the answer on the facts of *Hensler* was that it runs from the date the statute became effective). (*Hensler v. City of Glendale, supra,* 8 Cal.4th at p. 22, 32 Cal.Rptr.2d 244, 876 P.2d 1043.) Thus, although *Hensler* provides the framework for our discussion, it does not answer the specific issue raised by SMB's petition.

far if it is "not reasonably necessary to the effectuation of a substantial government purpose." (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 834, 107 S.Ct. at p. 3147, citing *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631.)

In *Nollan,* the question was whether the California Coastal Commission could require an applicant for a building permit to dedicate part of his land as an easement for public access to the beach. (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 834, 107 S.Ct. at p. 3147, fn. 3.) Since the Supreme Court concluded that such a permit condition could not pass constitutional muster under *any* standard, it was unnecessary for the Court to articulate the precise test to be applied to determine when a regulation "goes too far." But the Supreme Court did use *Nollan* to *expressly reject* the Coastal Commission's contention that the test for a "taking" is whether the state, in the exercise of its police power, "could rationally have decided" the permit condition might achieve the state's objective. (*Ibid.*) That, at least, disposes of the "rational basis" test adopted by the trial court in our case.

In our view, *Nollan* left in place the tests previously articulated in *Agins v. Tiburon, supra,* 447 U.S. at p. 260, 100 S.Ct. at p. 2141, and *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at pp. 125-127, 98 S.Ct. at pp. 2659-2660. What this means is that a statute "goes too far" and thus supports a compensable regulatory taking claim if (1) it denies an owner the economically viable use of his land without (2) substantially advancing a (3) reasonably necessary and (4) legitimate state interest, issues to be determined by the trial court's consideration of (a) the economic impact of the regulation on the owner, (b) the extent of the interference with the owner's reasonable investment-backed expectations, (c) the character and nature of the regulation, (d) the extent (if any) to which the owner benefits from the regulation, and (e) the nature and importance of the public interests which the regulation serves.

In *Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 171, 4 Cal.Rptr.2d 114, Division Three of the First District held that "any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases." As our Supreme Court recently explained, however, while "[t]here is no question that the takings clause is specially protective of property against *physical occupation* or invasion," and no question that the government "generally has greater leeway with respect to noninvasive forms of land use regulation" where the " 'extortionate' use of the police power to exact unconstitutional conditions is not present," *Blue Jeans* must be limited to its facts and where (as here) it is alleged that a monetary exaction is imposed "on an individual and discretionary basis, ... the heightened standard of judicial scrutiny of *Nollan* and *Dolan* [*v. City of Tigard* (1994) 512 U.S. ---- [, ----, 114 S.Ct. 2309, 2317,] [129 L.Ed.2d 304, 317]] is triggered." (*Ehrlich v. City of Culver City* (1996) --- Cal.4th ----, ----, 50 Cal.Rptr.2d 242, 911 P.2d 429.)[6] While we do not question the basic rule that not every regulation results in a

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[6] In *Dolan*, a case involving conditions imposed upon a property owner who wanted to double the size of her retail store and pave over her parking lot, the Supreme Court held that, to avoid a "taking" claim, the City of Tigard would have to demonstrate not only (1) that an *essential nexus* existed between the legitimate state interests involved and the permit conditions (a requirement previously imposed by *Nollan*), but also (2) that there was a *rough proportionality* between the exactions and the projected impact of the proposed development. (*Dolan v. City of Tigard, supra*, 512 U.S. at p. ---- - ----, 114 S.Ct. at pp. 2317-2320, [129 L.Ed.2d at pp. 317-320].) In *Yee v. Escondido, supra*, 503 U.S. at pp. 533-538, 112 S.Ct. at pp. 1531-1534, where several mobilehome park owners challenged a mobilehome park rent control ordinance as a regulatory taking, the Supreme Court refused to decide the issue now before us because it had not been raised below but suggested, in dicta, that the analysis would be whether there was "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."

compensable taking, we believe the trend toward more far-reaching (and numerically more) socially engineered land-use regulations supports our interpretation of *Nollan* and our holding that its rules apply to the type of regulatory taking at issue in this case. And although *Blue Jeans* as written might arguably have supported a different conclusion, the manner in which it has been construed by the Supreme Court makes it entirely consistent with the result we reach in this case.[7]

III.

If, at trial, SMB is able to establish that Santa Monica's rent control law "goes too far," the fact that rent control ordinances have been upheld against facial constitutional challenges (e.g., *Pennell v. San Jose* (1988) 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1; *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 197 Cal.Rptr. 284, 672 P.2d 1297; *Yee v. Escondido, supra,* 503 U.S. 519, 112 S.Ct. 1522; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165, 130 Cal.Rptr. 465, 550 P.2d 1001) does not preclude a finding that Santa Monica's ordinance is unconstitutional *as applied* to SMB. (*Pennell v. San Jose, supra,* 485 U.S. at pp. 10-11, 108 S.Ct. at pp. 856-857; cf. *Healing v. California Coastal*

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[7] When we filed this opinion, *Ehrlich* was still pending before the Supreme court. After the Supreme Court filed *Ehrlich,* the Board filed a petition for rehearing in which it suggested that our opinion was inconsistent with *Ehrlich.* We disagree. *Ehrlich* applies the heightened scrutiny test of *Nollan* and *Dolan* to a monetary exaction imposed by a city as a condition of approving a rezoning request and expressly rejects the suggestion that "the heightened takings clause standard formulated by the court in *Nollan* and *Dolan* applies *only* to cases in which the local land use authority requires the developer to dedicate real property to public use as a condition of permit approval." (*Ehrlich v. City of Culver City, supra,* --- Cal.4th at p. ---, 50 Cal.Rptr.2d 242, 911 P.2d 429.) Thus, to the extent *Ehrlich* addresses the issue now before us, it is entirely consistent with the result we reach.

Com., supra, 22 Cal.App.4th at pp. 1166-1168, 27 Cal.Rptr.2d 758.)

For the record, we note that if SMB can prove what it has pleaded, it would win even on the "rational basis" test rejected in *Nollan.* If, in fact, Santa Monica's rent control law has reduced rather than increased the number of rental units available to those intended to be benefited by that law, then the regulation has no relationship (nexus) at all to its stated purpose. Deference to legislative authority cannot salvage a regulation that defeats rather than accomplishes its stated purpose. As was said in *Cotati Alliance for Better Housing v. City of Cotati* (1983) 148 Cal.App.3d 280, 296, 195 Cal.Rptr. 825, and adopted by us in *Kavanau v. Santa Monica Rent Control Bd., supra,* 19 Cal. App.4th at p. 736, 23 Cal.Rptr.2d 724, "the purpose of rent control is not to make the landlord a private guarantor of affordable housing for tenants, nor is it to bring about such a degree of decreased maintenance and services as to diminish the quality of housing available. The purpose of rent control is to permit an efficient landlord to pay all actual and reasonable expenses and receive a fair profit while, at the same time, protecting the public interest in having affordable and properly maintained rental housing available to the citizens of the community."[8]

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[8] In *McDougal v. County of Imperial* (9th Cir.1991) 942 F.2d 668, 676, the Ninth Circuit rejected the notion that "any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property.... [W]e believe that a court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land." In *Healing v. California Coastal Com., supra,* 22 Cal.App.4th at p. 1174, 27 Cal.Rptr.2d 758, we explained that, "[t]o resolve this issue, evidence must be considered." Quoting

(continued...)

And, as one commentator put it, "[w]ith the possible exception of a short-term response to a wartime emergency, the traditional objectives of rent control are highly vulnerable to attack under *Nollan's* substantial advancement test. Responding to housing shortages or redistributing wealth may be regarded as legitimate state interests, but rent control generally fails to substantially advance these goals. Conversely, the political objectives that are furthered by rent control are of dubious legitimacy...." (R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control* (1992) 21 Sw.U.L.Rev. 1019, 1065, fns. omitted.)

The bottom line, therefore, is this: If SMB establishes (as it has alleged) that Santa Monica's rent control law "goes too far" as applied to SMB, SMB will have established a compensable regulatory taking.[9]

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[8] (...continued)
McDougal, we continued: " 'The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the [owner's] property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. These things typically cannot be assessed properly without a factual record.' " (*Healing v. California Coastal Com., supra*, 22 Cal.App.4th at p. 1174, 27 Cal.Rptr.2d 758, quoting *McDougal v. County of Imperial, supra*, 942 F.2d at p. 680.)

[9] In its return to SMB's petition, the Board contends that SMB's inverse condemnation complaint is barred by the applicable statute of limitations and by SMB's failure to exhaust administrative remedies. By implication, the trial court rejected these arguments when it sustained the Board's demurrer solely on the ground discussed in this opinion. Since these are fact-based issues which could not, in any event, be determined by demurrer, the trial court's order cannot be sustained on either of these alternative grounds. Because these and perhaps other issues not raised in these writ proceedings remain to be

(continued...)

DISPOSITION

Let a peremptory writ issue commanding the trial court (1) to vacate its orders sustaining the Board's demurrer to SMB's inverse condemnation action and dismissing that portion of SMB's complaint; (2) to enter a new order overruling the Board's demurrer and directing the Board to answer within the time specified by the trial court; and (3) if and when SMB's inverse condemnation action is tried, to determine the taking issue according to the standard articulated in this opinion.

ORTEGA, Acting P.J., and MASTERSON, J., concur.

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[9] (...continued)
determined, our disposition refers to "if" and when this case is tried (rather than assuming it absolutely will be tried).

Appendix C-1

Filed 10/20/95

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SANTA MONICA BEACH, LTD., Plaintiff and Petitioner,	No. SS005266
v.	~~PROPOSED~~ ORDER
SANTA MONICA RENT CONTROL BOARD, Defendant and Respondent.	SUSTAINING DEFENDANT'S DEMURRER TO CAUSE OF ACTION FOR INVERSE CONDEMNATION IN FIRST AMENDED COMPLAINT
DENNIS POWER, et al., Real Parties in Interest.	

The demurrer of defendant Santa Monica Rent Control Board to the first cause of action for inverse condemnation in plaintiff Santa Monica Beach, Ltd.'s First Amended Complaint for Inverse Condemnation and Petition for Writ of Administrative Mandate (CCP § 1094.5) came on regularly for hearing on July 27, 1995, at 1:30 p.m., before Honorable Alan B. Haber, Judge presiding, in Department B of the Los Angeles County Superior Court, West District, with appearances by counsel as follows: Nathan D. Schmidt appeared for plaintiff and Ralph H. Goldsen, staff attorney, appeared for defendant.

The Court, having read and considered the supporting and opposing papers, and having heard and considered supporting and opposing arguments, and good cause appearing therefore:

IT IS HEREBY ORDERED that the demurrer of defendant Santa Monica Rent Control Board to plaintiff's first cause of action for inverse condemnation be, and hereby is, sustained

without leave to amend. I find that plaintiff cannot cure the pleading defects. I find that the rational basis test applies to regulatory takings.

DATED: Oct 20 1995 .

ALAN B. HABER
ALAN B. HABER

Judge of the Superior Court

Submitted by:

JAMES S. BURLING, No. 113013
R. S. RADFORD, No. 137533
NATHAN D. SCHMIDT, No. 171990

Attorneys for plaintiff
SANTA MONICA BEACH, LTD.

Approved as to form:

DATED: October 23, 1995.

By /s/RALPH H. GOLDSEN
RALPH H. GOLDSEN
Staff Attorney

Attorneys for Defendant and
Respondent SANTA MONICA
RENT CONTROL BOARD

Appendix D-1

DUPLICATE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B — JUDGE ALAN B. HABER

SANTA MONICA BEACH LTD., Plaintiff,
vs.
SANTA MONICA RENT CONTROL BOARD, et al.,
Defendants.

No. SS 005 266

TRANSCRIPT OF PROCEEDINGS
JULY-27, 1995

APPEARANCES:

For the Plaintiff:
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ORIGINAL

Appendix D-2

LOS ANGELES, CALIFORNIA; WEDNESDAY, JULY 27, 1995

DEPARTMENT WE B JUDGE ALAN B. HABER

APPEARANCES:

Counsel for the Plaintiff, NATHAND. SCHMIDT, Esq.;

Counsel for the Defendants, RALPH E. GOLDSEN, Esq.

THE COURT: 39, Santa Monica Beach Limited versus Santa Monica Rent Control Board.

MR. SCHMIDT: Good afternoon, your Honor. Nathan Schmidt representing Plaintiff Santa Monica Beach Limited.

MR. GOLDSEN: Good afternoon, your Honor. Ralph Goldsen for Defendant Santa Monica Rent Control Board.

THE COURT: Anything not in the briefs that you would like me to consider?

MR. SCHMIDT: I'd like to briefly --

THE COURT: They're pretty extensive, and I really would appreciate showing some restraint, and not attempting to argue matters that I've already considered in the brief.

Look, I understand. If I were in your position, I would not be content with the tentative ruling, but it's not going to -- Look, first of all, I have to tell you, I have1 to admit that this area of law is extremely -- it's not completely foreign to me. It's maybe once every couple of months that I get involved.

It may not be esoteric to you gentlemen, and certainly someone that's dealing with the -- representing the Rent Control Board, and you seem like you sure know your oats when it comes to the issue of regulatory taking and inverse condemnation. You both know a lot more than I do about the subject. And I really -- I had a struggle with -- not because -- I'm not criticizing your briefs, but it's a very, very, for me, esoteric area of law, and I had to put a lot of time in, and I came

to a conclusion. And the bottom line is, it's not going to do a lot of good for you to rehash it in my presence right now.

MR. SCHMIDT: Okay. I'd just like to make one very brief response, then, to the Rent Board's reply.

THE COURT: If it will make you feel better, go ahead.

MR. SCHMIDT: It would make me feel better, your Honor.

THE COURT: Get it out of your system.

MR. SCHMIDT: Thank you.

THE COURT: Okay.

MR. SCHMIDT: I just wanted to point out that I feel that the Rent Board mischaracterizes the importance of the Supreme Court's action in the *Erlich* (phonetic) case in its reply, in stating that we cite it simply for the reason to show that it was granted certiorari. The Supreme Court did far more than grant certiorari in the case. They vacated the decision, remanded it for a further action by the Court of Appeals, in light of the heightened scrutiny established by the *Dolan* (phonetic) case.

The *Erlich* decision, or the *Erlich* case, related strictly to a monetary exaction. There's no argument that that relates to the logic of blue-jeans equity, which attempted to characterize *Dolan* as "possessory takings." It was strictly money that was demanded in exchange for a building permit.

THE COURT: I see.

MR. SCHMIDT: And on remand, the Court of Appeals did apply the Dolan standard to that monetary exaction, applied heightened scrutiny. And I can't give your Honor a cite at the moment. As you may be aware, that's currently been briefed and awaiting argument before the California Supreme Court, but the Court of Appeals did follow the Supreme Court, and did apply that heightened scrutiny standard to a purely regulatory taking.

THE COURT: All right. Do you feel the need to be heard?

MR. GOLDSEN: No, I don't, your Honor.

THE COURT: All right. Thank you. All right. As I told you, I hate to sound disinterested, but I did the best I could with my review of the briefs, and I am prepared to sustain the demurrer to the first amended complaint cause of action for inverse condemnation, without leave to amend. Either I'm right or I'm wrong with respect to my ruling, and I don't think it would do any good to give leave to amend. The issue is joined, and if I'm wrong, I'm sure I'll hear about it.

I find the Plaintiff cannot cure the pleading defects. I find the rational basis test applies to regulatory takings. Is notice waived?

MR. SCHMIDT: No, your Honor. We'd like notice.

MR. GOLDSEN: I would like to give notice.

THE COURT: All right. Thank you.

MR. GOLDSEN: Thank you.

MR. SCHMIDT: Thank you, your Honor.

THE COURT: You're welcome.

(Proceedings in the above-entitled matter were concluded.)

Appendix D-5

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT WE B JUDGE ALAN B. HABER

SANTA MONICA BEACH LTD.,) No. SS 00
)
Plaintiff,)
)
vs.)
)
SANTA MONICA RENT)
CONTROL BOARD, et al.,)
)
Defendants.)
)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, MARY ANN BRIGGS, a duly designated transcriber, do hereby declare and certify under penalty of perjury that I have caused to be transcribed the portion of tape 1 which was duly recorded in the Superior Court of the State of California, County of Los Angeles, Department WE B, on the 18th day of July, 1995, in the above-mentioned case, and that the foregoing pages comprise a true and correct, accurate transcription of the aforementioned tape.

Dated this 18th day of August, 1995.

/s/ MARY ANN BRIGGS
Transcriber

APPENDIX E

Appendix E-1

Filed 5/15/95

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Attorneys for Petitioner and Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SANTA MONICA BEACH, LTD., Petitioner and Plaintiff, v. SANTA MONICA RENT CONTROL BOARD, Respondent and Defendant. DENNIS POWER, DAVID COOPER, DENNIS SEVIER, ROBERT GROSSBARD, DOROTHY CONSTANTINE, MARGARETE HELL, IGOR MEDZHIBOVSKY, DANIEL WAX, MICHAEL HAMMERSCHMIDT, HAI VU, CHRISTOPHER CUSE, NADINE CUSE, TIMOTHY BLOCK, and DOES 1 through 15, inclusive, Real Parties in Interest.	No. SS005266 FIRST AMENDED COMPLAINT FOR INVERSE CONDEMNATION AND PETITION FOR WRIT OF ADMINISTRATIVE MANDATE (CCP § 1094.5)

* Petitioner and plaintiff Santa Monica Beach, Ltd., (plaintiff) respectfully seeks an order from this Court declaring that the Santa Monica Rent Control Charter Amendment effects an uncompensated regulatory taking of property as applied to plaintiff. Plaintiff also seeks an award of monetary compensation and petitions this Court for a Writ of Administrative Mandate directed against respondent and defendant Santa Monica Rent Control Board under Code of Civil Procedure § 1094.5. By this verified petition and complaint, plaintiff alleges the following:

PARTIES

1. Plaintiff Santa Monica Beach, Ltd., a limited partnership, is the legal record owner of a 12-unit residential rental property located at 928 Sixth Street, Santa Monica, California, County of Los Angeles (Property). The Property is subject to the provisions of Article XVIII, Charter of the City of Santa Monica, commonly known as the Santa Monica Rent Control Charter Amendment (Charter Amendment).

2. Respondent and defendant Santa Monica Rent Control Board (Rent Board or Board) is the public agency charged with administering the provisions of the Charter Amendment and its Rent Control Regulations.

3. Real parties in interest are now renters or residents of the Property who pay rent to plaintiff in amounts subject to control under the Charter Amendment.

4. Plaintiff is ignorant of the true names and capacities of real parties in interest designated herein as Does 1 through 15, inclusive, and therefore designates these parties by such fictitious names. Plaintiff will amend this complaint and petition to allege their true names and capacities when ascertained.

ALLEGATIONS

5. In April of 1979, the City of Santa Monica adopted the Santa Monica Rent Control Charter Amendment, now codified

at Article XVIII, §§ 1800 through 1820, of the Santa Monica City Charter. The Charter Amendment is a comprehensive rent control scheme which creates the Rent Board, requires that owners register each rental unit and pay annual registration fees to the Rent Board, establishes maximum allowable rents, provides for annual general adjustments and individual adjustments of allowable rents, prohibits evictions except for specified reasons, and prescribes remedies for violations of its provisions. A true copy of the Charter Amendment is attached hereto as Exhibit 1.

6. Residents of the City of Santa Monica were subjected to the Charter Amendment continuously between 1980 and 1990. Over this decade, Santa Monica's stock of rental housing declined by nearly 5% while the rental housing supply *increased* in all comparable Southern California cities without rent control.

7. As set forth at Charter Amendment § 1800, the stated purpose of the Charter Amendment is to assist "the poor, minorities, students, young families, and senior citizens." In practice, however, rent control has been an agent of gentrification in Santa Monica. During the rent-controlled decade of the 1980s Santa Monica experienced a loss of 775 low-income renter households, a decrease of nearly 12%. The number of low-income renter households *increased* over this period in every comparable city in Southern California without rent control. Santa Monica also lost 285 very low-income renter households during the city's first decade of rent control. This was the largest decrease in the number of very low-income renters of any comparable Southern California city.

8. Concurrent with this exodus of economically disadvantaged renters under rent control, Santa Monica experienced a 37% increase in the proportion of households with very high incomes between 1980 and 1990. This population shift toward upper-income households occurred during a decade when the proportion of very high-income households *dropped* by more than 8% in Los Angeles County as a whole.

9. Under rent control, housing in Santa Monica has become increasingly unavailable to young families. Between 1980 and 1990, the number of family households with children in Santa Monica fell by 1,299, a decline of more than 6%. No comparable city in Southern California without rent control lost family households over the decade of the 1980s.

10. The impact of rent control has been especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under 18 in Santa Monica fell by 593 between 1980 and 1990, a decrease of more than 27%, despite an *increase* in such households in Los Angeles County as a whole.

11. Under rent control, Santa Monica's elderly population (aged 65 or over) declined by 1.7% between 1980 and 1990. This decrease is especially remarkable because the elderly population of Los Angeles County *rose* by more than 15% over the same decade. The elderly population increased over this period in every comparable city without rent control in Southern California.

12. The Charter Amendment charges the Rent Board with the responsibility to receive and review petitions for rent adjustments and complaints. The Rent Board is empowered to conduct hearings, receive evidence, and make decisions regarding individual rents within the City.

13. Section 1805(e) of the Charter Amendment mandates that the Rent Board, in determining individual and general rent adjustments, shall consider all factors "deemed relevant by the Board in providing the landlord a fair return," including but not limited to 11 enumerated factors, one of which is "the landlord's rate of return on investment."

14. On March 27, 1992, plaintiff filed Rent Increase Petition I-1188 with the Rent Board seeking rent adjustments for all residential rental units located on the Property.

15. Pursuant to the individual rent adjustment requirements found at Charter Amendment § 1809(e) and Chapter 4 of the Regulations, plaintiff was required to prove that the Property was producing less than a "fair return" under a comparative Net Operating Income (NOI) analysis that compares the NOI of calendar year 1978 to that of calendar year 1991, the most recent year prior to the filing of Petition I-1188.

16. On April 14, 1992, the Rent Board's Hearing Examiner held an administrative hearing to determine whether plaintiff was entitled to a rent increase.

17. On May 21, 1992, the Hearing Examiner rendered a written decision which found that plaintiff was not entitled to a rent increase.

18. As part of the Rent Increase Petition process, the Hearing Examiner made findings reflected in the decision that plaintiff's operating expenses in the Base Year of 1978 were $14,879.

19. On June 1, 1992, plaintiff appealed the decision of the Hearing Examiner.

20. The Rent Board considered plaintiff's appeal at its weekly public meeting of July 2, 1992. At this meeting the Board rejected plaintiff's arguments and affirmed the Hearing Examiner's decision.

21. Although plaintiff was denied the rent increase sought in Petition I-1188, plaintiff was entitled under the Charter Amendment to implement the full general rent adjustment effective September 1, 1992.

22. While Petition I-1188 was pending before the Board, the Board modified Regulation 4101(c) to separate insurance costs from administrative management costs. There is no provision giving this regulation a retroactive effect.

23. Also while Petition I-1188 was pending, the Board extensively modified Regulation 4108. As originally adopted, Regulation 4108 *temporarily delayed* implementation of general rent adjustments in cases where owners received large rent increases. The revised Regulation 4108, as adopted on June 3, 1992, *permanently denies* up to one year of future general rent adjustments in the event an owner was entitled to *any* rent increase, no matter how small the amount.

24. On March 30, 1993, plaintiff filed a second rent increase petition, Petition I-1299. This petition sought rent increases on the Property based on plaintiff's income and expenses of calendar year 1992.

25. On April 19, 1993, the Rent Board's Hearing Examiner held an administrative hearing to determine whether plaintiff was entitled to a rent increase.

26. On June 19, 1993, the Hearing Examiner rendered a written decision which found that plaintiff was entitled to a permanent rent increase of $3 per unit per month and temporary rent increases averaging $58 per unit per month.

27. On July 12, 1993, plaintiff appealed the Hearing Examiner's decision in Petition I-1299, raising the following objections:

A. Plaintiff objected to the consideration of income from parking spaces rented separately from the Property's apartments, which was not subject to the Rent Board's jurisdiction or authority.

B. Plaintiff objected to the making of factual determinations by the Hearing Examiner that were contrary to determinations made in the Board's previous decision regarding Petition I-1188.

C. Plaintiff objected to the Hearing Examiner's application of Regulation 4108. This Regulation was applied to reduce plaintiff's rent increase entitlement based on 1992 Net

Operating Income and was also applied to permanently deny three-fourths of the general rent adjustment to be implemented in 1993 and 1994.

28. Plaintiff's appeal was considered by the Rent Board at its weekly public meeting of August 12, 1993. At that meeting the Board affirmed the Hearing Examiner's decision and did not accept any of plaintiff's issues raised on appeal.

29. On August 19, 1993, plaintiff presented to the Rent Board a written request for a copy of the administrative record for Petition I-1299 pursuant to Code of Civil Procedure § 1094.6. The Rent Board produced a copy of the record on January 6, 1994, and a copy of that record was lodged with this Court on February 3, 1995.

FIRST CAUSE OF ACTION:
INVERSE CONDEMNATION

30. Plaintiff hereby realleges each and every allegation of Paragraphs 1 through 29 above as if set forth again in full here.

31. Plaintiff contends that the Charter Amendment as applied to plaintiff violates plaintiff's federal and state constitutional rights in that it fails to substantially advance a legitimate governmental interest as required by the Takings Clause of the Fifth Amendment to the United States Constitution and Article I, Section 19, of the California Constitution. *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987). In *Nollan*, 483 U.S. at 834-37, the "substantial advancement" test required property regulations to substantially mitigate some social harm that would otherwise result from the owner's unregulated use of his property. A property regulation can fail the "substantial advancement" test in other ways as well, including the failure in practice to advance the specific purpose stated in the regulation.

32. Because defendant's application of the Charter Amendment has reduced the availability of private rental

housing in Santa Monica and has made it more difficult for low-income renters, young families, and the elderly to find affordable rental housing, the Charter Amendment is not substantially advancing its stated purpose of implementing the housing policies of the city with regard to these population groups.

33. The Rent Board's final determination regarding Petition I-1299 does not substantially advance a legitimate governmental interest, nor is there any close nexus between the denial of plaintiff's application for a fair rate of return on capital investments and any public harm that might result from plaintiff's unregulated operation of the Property, because unregulated use of the Property by plaintiff would not have resulted in the problems allegedly addressed by the Charter Amendment, *i.e.*, a shortage of available housing for low-income renters, young families, and the elderly.

34. Even if regulations substantially advance a legitimate governmental interest, they will still violate the Takings Clause of the Fifth Amendment and Article I, Section 19, of the California Constitution if they deny an owner economically viable use of his property. *Nollan*, 483 U.S. at 834. California courts have consistently applied this standard to rent control, striking down such measures if their impact on property owners is found to be "confiscatory." *See Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 169 (1976).

35. The Rent Board's final determination regarding Petition I-1299 has denied plaintiff a fair return on its investment in capital improvements in violation of state and federal law and the terms of the Charter Amendment itself.

36. The Charter Amendment as applied to the Property has deprived plaintiff of essential attributes of ownership of its private property, including the right to exclude others and the right to determine the terms upon which leasehold interests in plaintiff's Property will be alienated.

37. Plaintiff has received no compensation for the damages inflicted by defendant's application of the Charter Amendment to the Property, and the Charter Amendment contains no provision for seeking or obtaining compensation.

38. For each and all of the foregoing reasons, the Rent Board's application of the Charter Amendment to the Property comprises a regulatory taking of plaintiff's Property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution.

39. A trial de novo is necessary to examine the constitutional issues in this case. The administrative record compiled by the Rent Board is inadequate for this purpose because the Rent Board does not conduct the kind of judicial proceedings needed to safeguard plaintiff's fundamental right to due process of law or its right not to be deprived of its property without just compensation. *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1174 (1994).

40. Plaintiff does not have a plain, speedy, or adequate remedy in the ordinary course of the law other than the relief requested herein. Plaintiff has exhausted all administrative remedies required by law; this action is ripe for adjudication and is timely filed.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION:
ADMINISTRATIVE MANDAMUS

41. Plaintiff hereby realleges each and every allegation of Paragraphs 1 through 40 above as if set forth again in full here.

REGULATORY TAKING

42. The Rent Board's final determination regarding Petition I-1299 is invalid under Code of Civil Procedure

§ 1094.5 in that the Rent Board proceeded in excess of or without jurisdiction or lawful authority.

43. The Rent Board has proceeded without lawful authority in this matter in that its actions and deliberations were taken pursuant to an unconstitutional enactment. The Charter Amendment has depleted the stock of affordable housing in Santa Monica and imposed special hardships on low-income renters, young families, and the elderly in contravention of its stated purposes. For this reason, the Charter Amendment does not substantially advance a legitimate governmental interest and is therefore invalid as a regulatory taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution. The Rent Board is without lawful authority to apply this unconstitutional ordinance to plaintiff or its property.

44. The Rent Board's decision herein affected plaintiff's fundamental vested constitutional right not to have its property taken for public use without just compensation. Plaintiff is therefore entitled to de novo review of the evidence before the Rent Board and any additional evidence submitted on the regulatory takings claim, as provided in *Hensler v. City of Glendale*, 8 Cal. 4th 1, 16 (1994).

PARKING REVENUES

45. The Charter Amendment does not grant the Board authority to regulate any income except rent received from controlled rental housing units. By including plaintiff's 1992 parking revenues in its gross income calculations, the Board wrongfully understated plaintiff's rent increase entitlement. Consequently, the Rent Board's final decision regarding Petition I-1299 is invalid under Code of Civil Procedure § 1094.5 in that the Board proceeded in excess of or without jurisdiction or lawful authority.

PREVIOUS FINDINGS OF FACT

46. The Rent Board has no jurisdiction or authority to change findings made in previous final Board decisions. By failing to follow the determinations made in case I-1188, the Board added unclaimed and unproven insurance expenses to its computation of plaintiff's 1978 operating costs in case I-1299.

REGULATION 4108

47. Application of Regulation 4108 by the Rent Board can only lead to arbitrary and capricious results for the following reasons.

48. Regulation 4108 is in direct conflict with all other provisions of the "fair return" rent increase process adopted by the Board. Rent Control Regulations 4100 through 4106 require that 1978 "Base Year" NOI be increased at 40% of the change in the inflation rate as of the date of filing the petition. The Rent Board's application of Regulation 4108, however, reduces the resulting rent increase entitlement by using *future* potential income to reduce plaintiff's entitlement for the *past* year.

49. The Rent Board's application of Regulation 4108 is in conflict with Rent Control Regulation 4101. Regulation 4101 requires that gross income be calculated at 100% paid occupancy and does not allow future revenue projections to inflate the current year's income.

50. The Rent Board's application of Regulation 4108 effects the sort of "income analyzing" that was rejected by the Court of Appeal in *Abramson v. City of West Hollywood*, 7 Cal. App. 4th 1121 (1992).

51. The Rent Board's application of Regulation 4108 is in conflict with general accounting principles which require that income and expenses be matched over the same period of time.

52. The Rent Board's application of Regulation 4108 leads to absurd results in that, if the Board determines that an

individual rent increase is required in order to maintain a "fair return," it then applies Regulation 4108 to disallow part or all of the general rent adjustment for the following year.

53. Regulation 4108 constitutes a penalty on owners who file rent increase petitions. Owners are better off not filing a petition than proving an entitlement to a modest rent increase. Had plaintiff not filed Petition I-1299, plaintiff would have been entitled to a general rent adjustment in September, 1993, of $20 per unit per month in permanent rent increases. However, because plaintiff proved an entitlement to a permanent rent increase of $3 per unit per month, three-fourths of the general rent adjustment was disallowed. Thus the Rent Board deprived plaintiff of a $15 general rent increase as the "price" of granting plaintiff a $3 individual rent increase.

54. Regulation 4108 is based on the false premise that owners file a rent increase petition because they elect to receive an individual adjustment *rather than* accept the general adjustment to which they are entitled. In fact, no rational owner would seek to prove that he or she was receiving less than a fair return in 1992 if that determination would mean forfeiting the general rent adjustment for 1993.

55. Plaintiff does not have a plain, speedy, or adequate remedy in the ordinary course of the law other than the relief requested herein. Plaintiff has exhausted all administrative remedies required by law; this action is ripe for adjudication and timely filed.

WHEREFORE, plaintiff prays for judgment as hereinafter set forth below.

PRAYER FOR RELIEF

Based upon the allegations above, plaintiff Santa Monica Beach, Ltd., prays for judgment against defendant Santa Monica Rent Control Board as follows:

1. for an order declaring that the Santa Monica Rent Control Charter Amendment, as applied to plaintiff, comprises a regulatory taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19, of the California Constitution; and for an order awarding just compensation, in an amount to be ascertained at trial, for the temporary taking of plaintiff's property from August 12, 1993, to such future date as the Rent Board ceases enforcing the provisions of the Charter Amendment against plaintiff;

2. for a writ of administrative mandate pursuant to Code of Civil Procedure § 1094.5, compelling the Santa Monica Rent Control Board to set aside the final determination of Petition I-1299 in its entirety because said determination exceeds the Rent Board's authority and violates plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 7 and 19, of the California Constitution; or

3. in the alternative, for a writ of administrative mandate pursuant to Code of Civil Procedure § 1094.5 compelling the Santa Monica Rent Control Board to set aside those portions of its final determination of Petition I-1299 which (1) exceed the Board's jurisdiction or authority, (2) include plaintiff's parking revenues as part of Net Operating Income, (3) incorporate findings in conflict with the Board's final determination of Petition I-1188; or (4) result from the Board's application of Regulation 4108; and to enter a new decision which makes just and reasonable determinations of the amount of rent increases to which plaintiff is entitled under Regulations 4100 through 4106;

4. for costs of suit including reasonable attorneys' fees; and

5. for such other and further relief as the Court may deem proper.

DATED: May 12, 1995.

Respectfully submitted,

JAMES S. BURLING
R. S. RADFORD
NATHAN D. SCHMIDT

By /s/ NATHAN D. SCHMIDT
NATHAN D. SCHMIDT

Attorneys for Petitioner
and Plaintiff

VERIFICATION

I, Carl J. Lambert, declare:

I am President of Lambert Investments, Inc., the Corporate General Partner of Santa Monica Beach Limited, petitioner and plaintiff in this action. I have read the affixed complaint for inverse condemnation and petition for writ of administrative mandate and know its contents and verify the same to be true of my own knowledge with the exception of Paragraphs 6 through 11, which I verify to be true on information and belief.

I declare under penalty of perjury that the foregoing is true and that this verification was executed on this 11th day of May, 1995, at Santa Monica, California.

/s/ CARL J. LAMBERT
CARL J. LAMBERT
Santa Monica Beach, Ltd.

APPENDIX F

Appendix F-1

RENT CONTROL CHARTER AMENDMENT

Article XVIII Is enacted as follows:

ARTICLE XVIII. RENT CONTROL

1800. Statement of Purpose

A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return.

In order to accomplish this purpose, this Article provides for an elected Rent Control Board to ensure that rents are at a fair level by requiring landlords to justify any rents in excess of the rents in effect one year prior to the adoption of this Article. Tenants may seek rent reductions from the rent in effect one year prior to the adoption of this Article by establishing that those rents are excessive. In addition to giving tenants an opportunity to contest any rent increase, this Article attempts to provide reasonable protection to tenants by controlling removal of controlled rental units from the housing market and by requiring just cause for any eviction from a controlled rental unit.

Through this Article, the city exercises its police power in order to address the serious housing problem recognized in the original

enactment of this Rent Control Law in 1979 and still existing in 1984. The 1984 Amendment to the Rent Control Law is intended to clarify the law and ensure that the Rent Control Board possesses adequate and independent authority to carry out its duties. It is intended to ensure due process of law for landlords and tenants, effective remedies for violation of the law, and consistency with constitutional requirements. It is also intended to enable the Board to provide relief to persons facing particular hardship and to protect and increase the supply of affordable housing in the city. Termination or erosion of the protections of this Article would have serious disruptive consequences for persons in need of protection and the supply of affordable housing in the city.

1801. Definitions

The following words or phrases as used in this Article shall have the following meanings:

(a) BOARD: The term "Board" refers to the elected Rent Control Board established by this Article.

(b) COMMISSIONERS: The members of the Board and Interim Board are denominated Commissioners.

(c) CONTROLLED RENTAL UNITS: All residential rental units in the City of Santa Monica, including mobile homes, and mobile home spaces, and trailers and trailer spaces, except single family homes to the extent provided for in section 1815 and those units found by the Board to be exempt under one or more of the following provisions:

(1) Rental units in hotels, motels, inns, tourist homes and rooming and boarding houses which are rented primarily to transient guests for a period of less than fourteen (14) days.

(2) Rental units in any hospital, convent, monastery, extended medical care facility, asylum, non-profit

home for the aged, or dormitory owned and operated by an institution of higher education.

(3) Rental units which a government unit, agency or authority owns, operates, manages, or in which governmentally subsidized tenants reside only if applicable federal or state law or administrative regulation specially exempt such units from municipal rent control.

(4) Rental units in owner-occupied dwellings with no more than three (3) units. For purposes of this section:

(i) The term "owner" means a natural person who owns a fifty (50) percent ownership interest in the building and resides on the property as his or her principal place of residence.

(ii) An exemption under this section shall expire by operation of law when the owner ceases to reside on the property as his or her principal place of residence; thereafter, all units on the property shall be subject to all provisions of this Article.

(5) Rental units and dwellings constructed after the adoption of this Article; this exemption does not apply to units created as a result of conversion as opposed to new construction.

(6) Where a unit is actually used for purposes of providing, on a non-profit basis, child care or other residential social services in accordance with applicable laws. This exemption shall expire when the use upon which exemption is based ceases. This exemption shall only apply to units as they become vacant and shall only operate to allow the specified use without the necessity of obtaining a removal permit under this Article. This exemption shall not

be construed to authorize the eviction of any tenant nor to authorize the charging of rent in excess of that permitted under this Article. The Board may adopt regulations to determine whether a unit qualifies for an exemption under this section.

(7) Exemptions are not automatic but shall be granted by the Board upon application by the owner pursuant to Board rules, provided that if the Board does not act upon a completed application for exemption within ninety (90) days of its filing it shall be deemed approved.

(d) HOUSING SERVICE: Housing services include, but are not limited to repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, refuse removal, furnishings, telephone, parking, and any other benefit, privilege or facility connected with the use or occupancy of any rental unit. Services to a rental unit shall include a proportionate part of services provided to common facilities of the building in which the rental unit is contained.

(e) LANDLORD: An owner, lessor, sublessor or any other person entitled to receive rent for the use and occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

(f) RENT: All periodic payments and all nonmonetary consideration including but not limited to, the fair market value of goods or services rendered to or for the benefit of the landlord under an agreement concerning the use or occupancy of a rental unit and premises including all payment and consideration demanded or paid for parking, pets, furniture, subletting and security deposits for damages and cleaning.

(g) RENTAL HOUSING AGREEMENT: An agreement, oral, written or implied, between a landlord and tenant for use or occupancy of a rental unit and for housing services.

(h) RENTAL UNITS: Any building, structure, or part thereof, or land appurtenant thereto, or any other rental property rented or offered for rent for living or dwelling house units, together with all housing services connected with use or occupancy of such property such as common areas and recreational facilities held out for use by the tenant.

(i) TENANT: A tenant, subtenant, lessee, sublessee or any other person entitled under the terms of a rental housing agreement to the use or occupancy of any rental unit.

(j) RECOGNIZED TENANT ORGANIZATION: Any group of tenants residing in controlled rental units in the same building or in different buildings operated by the same management company, agent or landlord, who requests to be so designated.

(k) RENT CEILING: Rent ceiling refers to the limit on the maximum allowable rent which a landlord may charge on any controlled rental unit.

(l) BASE RENT CEILING: The maximum allowable rent established in Section 1804(b).

(m) PROPERTY: All rental units on a parcel or lot or contiguous parcels or contiguous lots under common ownership.

(n) SINGLE FAMILY HOME: A property that has been developed with only one one-family dwelling and any lawful accessory structures, or a lawfully created condominium, stock cooperative or similar unit that is part of a larger residential structure or complex, excepting those condominiums, stock cooperatives, or similar units converted after April 10, 1979 for which no removal permit

or vested right determination has been issued by the Board, and those created pursuant to Article XX of this Chapter.

1802. Integrity and Autonomy of Board

The Rent Control Board shall be an integral part of the government of the city, but shall exercise its powers and duties under this Article independent of and without interference from the City Council, City Manager, and City Attorney. With respect to the internal organization and affairs of the Board:

(a) BUDGET: The Board shall, prior to July 1 of each year, hold a public hearing on a proposed budget and adopt an annual budget for the ensuing fiscal year. At least thirty-five days prior to the beginning of each fiscal year, the Board's Administrator shall submit to the Board the proposed budget as prepared by him or her. After reviewing the same and making such revisions as it may deem advisable, the Board shall determine the time for the holding of a public hearing thereon and shall cause to be published a notice thereof not less than ten days prior to said hearing, by at least one insertion in the official newspaper. Copies of the proposed budget shall be available for inspection by the public in the office of the Board at least ten days prior to said hearing. The City Council and the City Manager shall have no authority to oversee, supervise, or approve this budget. Upon final adoption, the budget shall be in effect for the ensuing fiscal year and the amounts stated therein shall be and become appropriated by the Board for the respective objects and purposes therein specified. At any meeting after the adoption of the budget the Board may amend or supplement the budget by the affirmative votes of at least three members. Copies of the adopted budget and any amendments or supplements shall be filed with the City Clerk, City Controller, and City Manager. Necessary adjustments to city administrative procedures shall be made.

(b) PERSONNEL: Except for the elected or appointed Commissioners, the Administrator, and attorneys employed to represent or advise the Board, all employees of the Board are within the classified civil service of the City. The Board shall appoint an administrator to administer and supervise the exercise of its powers and duties who shall be directly responsible to the Board. All employees of the Board, except the Administrator and attorneys, shall be hired, terminated, suspended, and demoted in accordance with the provisions of Article XI of the Charter and implementing provisions of the Municipal Code. The Board shall classify employee positions, establish employee salaries and benefits, evaluate the performance of its employees, and be responsible for the layoff and recall of its employees, pursuant to regulations and procedures that it establishes. The Board may enter into and approve a Memorandum of Understanding with representatives of its employees concerning their wages, benefits, hours of work, and terms and conditions of employment in accordance with state law. The City Council shall have no power to abolish positions established or classified by the Board under this Article, notwithstanding any other section of this Charter. Provisions of the Municipal Code and other ordinances or resolutions of the City Council shall not limit the Board's power to adopt regulations and policies and to approve Memorandums of Understanding governing its relationship with its employees under this Section.

(c) BOARD LEGAL WORK: Legal staff hired by the Board shall represent and advise the Board, its Commissioners, and its staff in any civil matters, actions, or proceedings in which the Board, its Commissioners, or its staff, in or by reason of their official capacity, are concerned or are a party. The Board may, in its sole discretion, and without approval of the City Council, retain private attorneys to furnish legal advice or representation in particular matters, actions or proceedings.

(d) CONTRACTS AND PURCHASES: The Board shall comply with the provisions of the City Charter providing for a centralized purchasing system and competitive bidding, and shall procure goods and services as do other City agencies. Provided, however, that the Board shall have sole and final authority to employ attorneys, legislative lobbyists, and other professionals, and to approve contracts for such professional services.

(e) CONFORMING REGULATIONS: If any portion of this Article is declared invalid or unenforceable by decision of a court of competent jurisdiction or rendered invalid or unenforceable by state or federal legislation, the Board and not the City Council shall have authority to enact replacement regulations consistent with the intent and purpose of the invalidated provision and applicable law. Such replacement regulations shall supersede invalidated or unenforceable provisions of this Article to the extent necessary to resolve any inconsistency. The subject matter of such replacement regulations shall be limited to rent control matters as enumerated in this Article.

1803. Permanent Rent Control Board

(a) COMPOSITION: There shall be in the City of Santa Monica a Rent Control Board. The Board shall consist of five elected Commissioners. The Board shall elect annually as chairperson, one of its members to serve in that capacity.

(b) ELIGIBILITY: Duly qualified electors of the City of Santa Monica are eligible to serve as Commissioners of the Board.

(c) FULL DISCLOSURE OF HOLDINGS: Candidates for the position of Commissioner shall submit a verified statement listing all of their interests and dealings in real property, including but not limited to its ownership, sale or management, during the previous three (3) years.

(d) ELECTION OF COMMISSIONERS: Commissioners shall be elected at general municipal elections in the same manner as set forth in Article XIV of the Santa Monica Charter, except that the first Commissioners shall be elected at a special municipal election held within ninety (90) days of the adoption of this Article. The elected Commissioners shall take office on the first Tuesday following their election.

(e) TERM OF OFFICE: Commissioners shall be elected to serve terms of four years, beginning on the first Tuesday following their election, except that of the first five Commissioners elected in accordance with Section 1803(d), the two Commissioners receiving the most votes shall serve until April 15, 1985 and the remaining three Commissioners shall serve until April 18, 1983. Commissioners shall serve a maximum of two full terms.

(f) POWERS AND DUTIES: The Board shall have the following powers and duties:

(1) Set the rent ceilings for all controlled rental units.

(2) Require registration of all controlled rental units under Section 1803(q).

(3) Establish a base rent ceiling on rents under Section 1804(b).

(4) To make adjustments in the rent ceiling in accordance with Section 1805.

(5) Set rents at fair and equitable levels in order to achieve the intent of this Article.

(6) Hire and pay necessary staff including hearing examiners and personnel to issue orders, rules and regulations, conduct hearings and charge fees as set forth below.

(7) Make such studies, surveys and investigations, conduct such hearings, and obtain such information as is necessary to carry out its powers and duties.

(8) Report annually to the City Council of the City of Santa Monica on the status of controlled rental housing.

(9) Remove rent controls under Section 1803(r).

(10) Issue permits for removal of controlled rental units from rental housing market under Section 1803(t).

(11) Administer oaths and affirmations and subpoena witnesses.

(12) Establish rules and regulations for deducting penalties and settling civil claims under Section 1809.

(13) Refer violations of this Article to appropriate authorities for criminal prosecution.

(14) Seek injunctive and other civil relief under Section 1811.

(15) Charge and collect registration fees, including penalties for late payments.

(g) RULES AND REGULATIONS: The Board shall issue and follow such rules and regulations, including those which are contained in this Article, as will further the purposes of the Article. The Board shall publicize its rules and regulations prior to promulgation in at least one newspaper of general circulation in the City of Santa Monica The Board shall hold at least one (1) public hearing to consider the views of interested parties prior to be adoption of general adjustments of the decision to decontrol or reimpose control for any class of rental units under Section 1803(r). All rules and regulations, internal staff memoranda, and written correspondence explaining the decisions, orders, and policies of the Board shall be kept in the Board's office and

shall be available to the public for inspection and copying. The Board shall publicize this Article so that all residents of Santa Monica will have the opportunity to become informed about their legal rights and duties under Rent Control in Santa Monica. The Board shall prepare a brochure which fully describes the legal rights and duties of landlords and tenants under Rent Control in Santa Monica. The brochure will be available to the public and each tenant of a controlled rental unit shall receive a copy of the brochure from his or her landlord.

(h) MEETINGS: The Board shall hold such regularly scheduled meetings as are necessary to ensure the timely performance of its duties under this Article. All regular and special meetings shall be called and conducted in accordance with state law.

(i) QUORUM: Three Commissioners shall constitute a quorum for the Board.

(j) VOTING: The affirmative vote of three Commissioners of the Board is required for a decision, including all motions, regulations, and orders of the Board.

(k) COMPENSATION: Each Commissioner shall receive for every meeting attended seventy-five dollars ($75.00), but in no event shall any Commissioner receive in any twelve month period more than forty-seven hundred and fifty dollars ($4,750) for services rendered.

(l) DOCKETS: The Board shall maintain and keep in its office all hearing dockets.

(m) VACANCIES: If a vacancy shall occur on the Board, the Board shall within thirty (30) days appoint a qualified person to fill such a vacancy until the following municipal election when a qualified person shall be elected to serve for the remainder of the term.

(n) FINANCING: The Board shall finance its reasonable and necessary expenses by charging landlords annual registration fees in amounts deemed reasonable by the Board. The Board may direct that all or part of such fees may be passed through from landlords to tenants and may establish applicable conditions and procedures. The Board is also empowered to request and receive funding when and if necessary from any available source for its reasonable and necessary expenses.

(o) RECALL: Commissioners may be recalled in accordance with the provisions of Article XIV of the Santa Monica Charter.

(p) STAFF: The Board shall employ and pay such staff, including hearing examiners and inspectors, as may be necessary to perform its function efficiently in order to fulfill the purpose of this Article.

(q) REGISTRATION: Within sixty (60) days after the adoption of this Article, the Board shall require the registration of all controlled rental units, which shall be re-registered at times deemed appropriate by the Board. The initial registration shall include the rent in effect at the time on the date of the adoption of this Article, base rent ceiling, the address of the rental unit, the name and address of the landlord, the housing services provided to the unit, a statement indicating all operating cost increases since the base rent ceiling date, and any other information deemed relevant by the Board. The Board shall require the landlord to report vacancies in the controlled rental units and shall make a list of vacant controlled rental units available to the public. If the Board, after the landlord has proper notice and after a hearing, determines that a landlord has wilfully and knowingly failed to register a controlled rental unit, the Board may authorize the tenant of such a non-registered controlled rental unit to withhold all or a portion of the rent for the unit until such time as the rental unit is properly

registered. After a rental unit is properly registered, the Board shall determine what portion, if any, of the withheld rent is owed to the landlord for the period in which the rental unit was not properly registered. Whether or not the Board allows such withholding, no landlord who has failed to register properly shall at any time increase rents for a controlled rental unit until such units are properly registered.

(r) DECONTROL: If the average annual vacancy rate in any category, classification, or area of controlled rental units exceeds five (5) percent, the Board is empowered, at its discretion and in order to achieve the objectives of this Article, to remove rent controls from such category, classification or area. The Board may determine such categories, classifications, or areas for purposes of decontrol consistent with the objectives of this Article. In determining the vacancy rate for any category, classification or area of controlled rental units, the Board shall consider all available data and shall conduct its own survey. If units are decontrolled pursuant to this subsection, controls shall be reimposed if the Board finds that the average annual vacancy rate has thereafter fallen below five (5) percent for such category, classification or area.

(s) SECURITY DEPOSITS: Any payment or deposit of money the primary function of which is to secure the performance of a rental agreement or any part of such agreement, including an advance payment of rent, shall be placed in an interest bearing account at a federally insured financial institution until such time as it is returned to the tenant or entitled to be used by the landlord. Unless and until the Board enacts regulations directing that the interest on such accounts be paid directly to the tenant, the landlord may either pay such interest directly to the tenant or use it to offset operating expenses, in which case the offset shall be a factor in making individual rent adjustments under

Section 1805. The Board may regulate the amount and use of security deposits consistent with the purposes of this Article and state law.

(t) REMOVAL OF CONTROLLED UNIT FROM RENTAL HOUSING MARKET:

(1) Any landlord who desires to remove a controlled rental unit from the rental housing market by demolition, conversion or other means is required to obtain a permit from the Board prior to such removal from the rental housing market in accordance with rules and regulations promulgated by the Board. In order to approve such a permit, the Board is required to find that the landlord cannot make a fair return by retaining the controlled rental unit.

(2) Notwithstanding the foregoing provisions of this subsection, the Board may approve such a permit:

(i) If the Board finds that the controlled rental unit is uninhabitable and is incapable of being made habitable in an economically feasible manner, or

(ii) If the permit is being sought so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval, that the units will not be exempt from the provisions of this Article pursuant to Section 1801(c) and that at least fifteen (15) percent of the controlled rental units to be built on the site will be at rents affordable by persons of low income.

(3) The Housing Element of the General Plan of the City of Santa Monica shall at all times contain a provision that neither the City Council nor any City agency shall approve an application for tentative subdivision map or tentative parcel map for a converted unit until and

unless the applicant first obtains a removal permit as required by this Section. This subsection shall not apply to any tentative subdivision map or tentative parcel map approved in accordance with Article XX relating to tenant ownership rights.

(4) The Board shall render its final decision within one hundred and twenty (120) days of the filing of a completed application under this section.

1804. Maximum Allowable Rents

(a) TEMPORARY FREEZE: Rents shall not be increased during the one hundred-twenty (120) day period following the date of adoption of this Article.

(b) ESTABLISHMENT OF BASE RENT CEILING: Beginning one-hundred-twenty (120) days after the adoption of this Article, no landlord shall charge rent for any controlled rental units in an amount greater than the rent in effect on the date one year prior to the adoption of this Article. The rent in effect on that date is the base rent ceiling and is a reference point from which fair rents shall be adjusted upward or downward in accordance with Section 1805. If there was no rent in effect on the date one year prior to the adoption of this Article, the base rent ceiling shall be the rent that was charged on the first date that rent was charged following the date one year prior to the adoption of this Article.

(c) POSTING: As soon as the landlord is aware of the maximum allowable rent, the landlord shall post it for each unit in a prominent place in or about the affected controlled rental units. The Board may require that other information it deems relevant also be posted.

1805. Individual and General Adjustment of Ceilings on Allowable Rents

(a) GENERAL ADJUSTMENT: The Board may, after holding those public hearings prescribed by Section 1803(g), set and adjust upward or downward the rent ceiling for all controlled rental units in general and/or for particular categories of controlled rental units deemed appropriate by the Board. Such an adjustment, however, need not take effect immediately, and the Board may decide that new rent ceilings shall not take effect until some reasonable date after the above-stated time periods.

(b) ANNUAL GENERAL ADJUSTMENT: Each year the Board shall generally adjust rents as follows:

(1) Adjust rents upward by granting landlords a utility and tax increase adjustment for actual increases in the City of Santa Monica for taxes and utilities.

(2) Adjust rents upward by granting landlords a maintenance increase adjustment for actual increases in the City of Santa Monica for maintenance expenses.

(3) Adjust rents downward by requiring landlords to decrease rents for any actual decreases in the City of Santa Monica for taxes.

In adjusting rents under this subsection, the Board shall adopt a formula of general application.

(c) PETITIONS: Upon receipt of a petition by a landlord and/or a tenant, the maximum rent of individual controlled rental units may be adjusted upward or downward in accordance with the procedures set forth elsewhere in this Section. The petition shall be on the form provided by the Board and shall include a declaration by the landlord that the unit meets all requirements of Section 1805(h). Notwithstanding any other provision of this Section, the

Board or hearing examiner may refuse to hold a hearing and/or grant a rent adjustment if an individual hearing has been held and decision made with regard to maximum rent within the previous six months.

(d) HEARING PROCEDURE: The Board shall enact rules and regulations governing hearings and appeals of individual adjustment of ceilings on allowable rents which shall include the following:

(1) HEARING EXAMINER: A hearing examiner appointed by the Board shall conduct a hearing to act upon the petition for individual adjustment of ceilings on allowable rents and shall have the power to administer oaths and affirmations.

(2) NOTICE: The Board shall notify the landlord if the petition was filed by the tenant, or the tenant, if the petition was filed by the landlord, of the receipt of such a petition and a copy thereof.

(3) TIME OF HEARING: The hearing officer shall notify all parties, as to the time, date and place of the hearing.

(4) RECORDS: The hearing examiner may require either party to a rent adjustment hearing to provide it with any books, records and papers deemed pertinent in addition to that information contained in registration statements. The hearing examiner shall conduct a current building inspection and/or request the city to conduct a current building inspection if the hearing examiner finds good cause to believe the Board's current information does not reflect the current condition of the controlled rental unit. The tenant may request the hearing examiner to order such an inspection prior to the date of the hearing. All documents required under this Section shall be made available to the parties involved prior to the hearing at

the office of the Board. In cases where information filed in a petition for rent ceiling adjustment or in additional submissions filed at the request of the hearing examiner is inadequate or false, no action shall be taken on said petition until the deficiency is remedied.

(5) OPEN HEARINGS: All rent ceiling adjustment hearings shall be open to the public.

(6) RIGHT OF ASSISTANCE: All parties to a hearing may have assistance in presenting evidence and developing their position from attorneys, legal workers, recognized tenant organization representatives or any other persons designated by said parties.

(7) HEARING RECORD: The Board shall make available for inspection and copying by any person an official record which shall constitute the exclusive record for decision on the issues at the hearing. The record of the hearing, or any part of one, shall be obtainable for the cost of copying. The record of the hearing shall include: all exhibits, papers and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted in the proceedings; a statement of all materials officially noticed; all recommended decisions; orders and/or rulings; all final decisions, orders and/or rulings, and the reasons for each final decision, order and/or ruling. Any party may have the proceeding tape recorded or otherwise transcribed at his or her own expense.

(8) QUANTUM OF PROOF AND NOTICE OF DECISION: No individual adjustment shall be granted unless supported by the preponderance of the evidence submitted at the hearing. All parties to a

hearing shall be sent a notice of the decision and a copy of the findings of fact and law upon which said decision is based. At the same time, parties to the proceeding shall also be notified of their right to any appeal allowed by the Board and/or to judicial review of the decision pursuant to this Section and Section 1808 of this Article.

(9) CONSOLIDATION: All landlord petitions pertaining to tenants in the same building will be consolidated for hearing, and all petitions filed by tenants occupying the same building shall be consolidated for hearing unless there is a showing of good cause not to consolidate such petitions.

(10) APPEAL: Any person aggrieved by the decision of the hearing examiner may appeal to the Board. On appeal, the Board shall affirm, reverse or modify the decision of the hearing examiner. The Board may conduct a de novo hearing or may act on the basis of the record before the hearing examiner without holding a hearing.

(11) FINALITY OF DECISION: The decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal; however, in the event that the Board on appeal reverses or modifies the decision of the hearing examiner, the landlord, in the case of an upward adjustment in rent, or the tenant, in the case of a downward adjustment of rent, shall be ordered to make retroactive payments to restore the parties to the position they would have occupied had the hearing examiners decision been the same as that of the Board.

(12) TIME FOR DECISION: The rules and regulations adopted by the Board shall provide for final action on any individual rent adjustment petition within one-hundred and twenty (120) days, following the date of filing of the individual rent adjustment petition.

(13) BOARD ACTION IN LIEU OF REFERENCE TO HEARING EXAMINER: The Board, on its own motion or on the request of any landlord or tenant, may hold a hearing on an individual petition for rent adjustment without the petition first being heard by a hearing examiner.

(14) Decisions decreasing rents shall remain in effect until the Board finds that the landlord has corrected the defect warranting the decrease. The Board shall, by regulation, establish procedures for making prompt compliance determinations. Upon a determination of compliance the landlord shall be entitled to reinstatement of the prior rent level, retroactive to the date that the landlord corrected the defect which warranted the decrease.

(e) In making individual and general adjustments of the rent ceiling, the Board shall consider the purposes of this Article and the requirements of law. The Board may adopt as its fair return standard any lawful formula, including but not limited to one based on investment or net operating income. The Board shall consider all factors relevant to the formula it employs; such factors may include: increases or decreases in operating and maintenance expenses, the extent of utilities paid by the landlord, necessary and reasonable capital improvement of the controlled rental unit as distinguished from normal repair, replacement and maintenance, increases or decreases in living space, furniture, furnishings, equipment, or services, substantial deterioration of the controlled rental unit other than as a

result of ordinary wear and tear, failure on the part of the landlord to provide adequate housing services or to comply substantially with applicable housing, health and safety codes, federal and state income tax benefits, the speculative nature of the investment, whether or not the property was acquired or is held as a long term or short term investment, the landlord's rate of return on investment, the landlord's current and base date Net Operating Income, and any other factor deemed relevant by the Board in providing the landlord a fair return.

(f) No rent increase shall be authorized by this Article because a landlord has a negative cash flow as the result of refinancing the controlled rental unit if at the time the landlord refinanced the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following refinancing. This paragraph shall only apply to that portion of the negative cash flow reasonably foreseeable within the one year period following refinancing of the controlled rental unit and shall only apply to controlled rental units refinanced after the date of adoption of this Article.

(g) No rent increase shall be authorized by this Article because a landlord has a negative cash flow if at the time the landlord acquired the controlled rental unit, the landlord could reasonably have foreseen a negative cash flow based on the rent schedule then in existence within the one year period following acquisition. This paragraph shall only apply to that portion of the negative cash flow reasonably foreseeable within the one year period following acquisition of a controlled rental unit and shall only apply to controlled rental units acquired after the date of adoption of this Article.

(h) No landlord shall increase rent under this Article if the landlord:

(1) Has failed to comply with any provisions of this Article and/or regulations issued thereunder by the Board, including the provisions requiring the payment of registration fees and registration penalties.

(2) Has failed to comply substantially with any applicable state or local housing, health or safety law. No landlord shall increase rent unless the notice increasing rent contains a statement in substantially the following form: "The undersigned (landlord) certifies that this unit and common areas are not subject to any uncorrected citation or notices of violation of any state or local housing health, or safety laws issued by any government official or agency." If a landlord fails to comply with this subsection, the tenant may refuse to pay the improperly noticed increase, may seek administrative or civil remedies under this Article, and may raise the landlords noncompliance as an affirmative defense in any resulting unlawful detainer action.

(i) The Board may, in its discretion, enact regulations to provide for increases of rents on units voluntarily vacated after the effective date of this subsection in properties where the landlord has dedicated a percentage of units to be rented to persons of very low or low income at affordable rents. The Board may enact procedures and other regulations governing determination of the conditions upon which such increases will be permitted, the extent of the increases, the required mix of affordable units to be provided, ways to ensure the continued provision of affordable housing under this subsection, the terms and conditions applicable when landlords cease to participate or when tenants vacate or cease to qualify for units dedicated to affordable housing, and other measures it deems necessary.

If the Board enacts regulations under this subsection, it shall provide for the following:

(1) That a property shall not be eligible for this program unless a specified percentage of all units on the property, no less than fifteen (15) percent, will be occupied by tenants of very low or low income and the rent on each unit so occupied does not exceed a specified percentage, no greater than thirty (30) percent, of such tenants' income.

(2) That tenants of very low or low income occupying units maintained at affordable rent levels under this program are protected if the landlord elects not to participate further in the program. Such protection shall include, at a minimum, a provision prohibiting the rent of such tenants from being increased by a percentage greater than the general annual adjustment allowed by the Board even if the resulting rent is below the maximum affordable rent and the landlord has lowered the rent for other units on the property.

1806. Eviction

No landlord shall take action to terminate any tenancy including service of any notice to quit or other eviction notice or bring any action to recover possession or be granted recovery of possession of a controlled rental unit unless:

(a) The tenant has failed to pay the rent to which the landlord is entitled under the rental housing agreement and this Article.

(b) The tenant has violated an obligation or covenant of his or her tenancy other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord in the manner required by law.

(c) The tenant is committing or expressly permitting a nuisance in, or is causing substantial damage to the controlled rental unit, or is creating a substantial interference with the comfort, safety, or enjoyment of the landlord or other occupants or neighbors of the same.

(d) The tenant is convicted of using or expressly permitting a controlled rental unit to be used for any illegal purpose.

(e) The tenant, who had a rental housing agreement which had terminated, has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms as are not inconsistent with or violative of any provisions of this Article and are materially the same as in the previous agreement.

(f) The tenant has refused the landlord reasonable access to the controlled rental unit for the purposes of making necessary repairs or improvements required by the laws of the United States, the State of California or any subdivision thereof, or for the purpose of showing the rental housing to any prospective purchaser or mortgagee.

(g) The tenant holding at the end of the term of the rental housing agreement is a subtenant not approved by the landlord.

(h) The landlord seeks to recover possession in good faith for use and occupancy by herself or himself, or her or his children, parents, grandparents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law.

(1) A "landlord" shall be defined as a natural person who has at least a fifty (50) percent ownership interest in the property.

(2) No eviction may take place if any landlord or enumerated relative already occupies one unit on the property, or if a vacancy already exists on the

property and the vacant unit is comparable to the unit for which eviction is sought. Where the vacant unit is determined not to be comparable, thereby permitting eviction under this subsection, the evicted tenant or tenants shall be first given the right to occupy the vacant unit and the rent thereof shall be the lesser of the maximum allowable rent for the vacant unit and the maximum allowable rent of the unit from which the tenant or tenants are evicted. The Rent Control Board shall promulgate regulations defining when a unit is comparable for purposes of this paragraph.

(3) The notice terminating tenancy shall contain the name, address and relationship to the landlord of the person intended to occupy.

(4) The landlord or enumerated relative must intend in good faith to move into the unit within thirty (30) days after the tenant vacates and to occupy the unit as a primary residence for at least one year. The Board may adopt regulations governing the determination of good faith.

(5) If the landlord or relative specified on the notice terminating tenancy fails to occupy the unit within thirty (30) days after the tenant vacates, the landlord shall:

(i) Offer the unit to the tenant who vacated it.

(ii) Pay to said tenant all reasonable expenses incurred in moving to and/or from the unit.

(6) No eviction pursuant to this subsection shall be allowed in any condominium or stock cooperative unit which has been converted from an apartment or other rental unit after April 10, 1979, unless the Rent Control Board has issued a removal permit or

declared a vested right for said unit. As used in this subpart, a unit shall be deemed converted after April 10, 1979, if on April 10, 1979, the recorded tract map or parcel map for the property showed the unit as included in the property.

(i) The landlord seeks to recover possession to demolish or otherwise remove the controlled rental unit from rental residential housing use after having obtained all proper permits from the City of Santa Monica.

Notwithstanding the above provisions, possession shall not be granted if it is determined that the eviction is in retaliation for the tenant reporting violations of this Article, for exercising rights granted under this Article, including the right to withhold rent upon authorization of the Board under Section 1803(q) or Section 1809 or for organization other tenants. In any notice purporting to terminate tenancy the landlord shall state the cause for the termination, and in any action brought to recover possession of a controlled rental unit, the landlord shall allege and prove compliance with this Section.

Any violation of this Section shall render the landlord liable to the tenant in a civil action for actual and punitive damages. The prevailing party in an action based upon this Section shall recover costs and attorneys fees.

1807. Non-waiverability

Any provision, whether oral or written in or pertaining to a rental housing agreement whereby any provision of this Article for the benefit of the tenant is waived, shall be deemed to be against public policy and shall be void.

1808. Judicial Review

A landlord or tenant aggrieved by any action or decision of the Board may seek judicial review by appealing to the appropriate court within the jurisdiction.

1809. Civil Remedies

(a) Any landlord who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this Article or any rule regulation or order hereunder promulgated, including the provisions ensuring compliance with habitability standards and registration fee requirements, shall be liable in a civil action to the tenant from whom such payments are demanded, accepted, received or retained, for reasonable attorney's fees and costs as determined by the court, plus damages in the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent. A civil penalty of treble the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent shall be awarded against the landlord upon a showing that the landlord has acted willfully or with oppression, fraud or malice. No administrative remedy need be exhausted prior to filing suit pursuant to this subsection.

(b) In lieu of filing a civil action, a tenant may file an administrative complaint. The Board shall establish by rule and regulation a hearing procedure similar to that set forth in Section 1805(d).

(1) The rules and regulations adopted by the Board shall provide for final Board action on any complaint for excess rent within one-hundred and twenty (120) days following the date of filing of the complaint.

(2) In any administrative hearing under this Section, a landlord who demands, accepts, receives or retains any payment of rent in excess of the maximum lawful rent shall be liable for damages in the amount by which the payment or payments demanded, accepted, received or retained exceeds the maximum lawful rent and may be liable for an additional amount not to

exceed Five Hundred Dollars ($500), for costs, expenses incurred in pursuing the hearing remedy, damages and penalties. The tenant shall bear the burden of proving entitlement to the penalty. The tenant may deduct the penalty and award of damages from future rent payments in the manner provided by the Board. An order authorizing rent withholding under this Article shall survive the sale or other transfer of the property and shall be binding upon successors of the landlord against whom the order was made. If a tenant authorized to withhold rent under this Article vacates the property, the landlord shall pay to such tenant a sum equal to the balance of the rent that the tenant could have withheld.

(c) If the tenant from whom such excessive payment is demanded, accepted, received or retained in violation of the foregoing provisions of this Article or any rule or regulation or order hereunder promulgated fails to bring a civil or administrative action as provided for in Section 1809(a) and 1809(b) within one hundred and twenty (120) days from the date of occurrence of the violation, the Board may settle the claim arising out of the violation or bring such action. Thereafter, the tenant on whose behalf the Board acted is barred from also bringing an action against the landlord in regard to the same violation for which the Board has made a settlement or brought action. In the event the Board settles said claim, it shall be entitled to retain the costs it incurred in settlement thereof, and the tenant against whom the violation has been committed shall be entitled to the remainder.

(d) The appropriate court in the jurisdiction in which the controlled rental unit affected is located shall have jurisdiction over all actions brought under this Section.

1810. Criminal Remedies

Any landlord violating this Article shall be guilty of a misdemeanor. Any landlord convicted of a misdemeanor under the provisions of this Article shall be punished by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment.

1811. Injunctive and Other Civil Relief

The Board, and tenants and landlords of controlled units, may seek relief from the appropriate court within the jurisdiction within which the affected controlled rental unit is located to enforce any provision of this Article or its implementing regulations or to restrain or enjoin any violation of this Article and of the rules, regulations, orders and decisions of the Board.

1812. Partial Invalidity

If any provision of this Article or application thereof to any person or circumstances is held invalid, this invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. This Article shall be liberally construed to achieve the purposes of this Article and to preserve its validity.

1813. Relationship to Article XX

Section 1803(t) of this Article shall not apply to any building for which approval has been received pursuant to Article XX (Tenant Ownership Rights Charter Amendment) of this Charter. All other provisions of this Article, however, shall continue to apply with full force and effect to each unit in any building receiving approval pursuant to Article XX. Tenants residing in such units, whether or not "qualifying," "participating," or any other such designation under Article XX, shall enjoy all the rights and remedies provided by this Article without limitation as to duration or to ownership of the unit. This Section is

declarative of existing law and does not impose any new requirements or limit any existing ones.

1814. Existing Board Practices

To the extent that the amendments to Article XVIII adopted at the same time as this Section incorporate rules, regulations and practices of the Rent Control Board existing on the date of the adoption hereof, this amendment is declarative of existing law and does not impose any new requirements or limit any existing ones.

1815. Single Family Homes

Single Family homes that were not used for residential rental purposes on July 1, 1984 are automatically exempt from the provisions of this Article. Single family homes that are not exempt under the preceding sentence are subject to all requirements of this Article, but shall be permanently exempted by the Board upon proof that the home has been continuously occupied by the owner for a period of two years as a principle place of residence after voluntary vacancy by the tenant or lawful eviction of the tenant. An owner may have only one exemption under this Section at any one time.

1820. State Owned Property

This Article shall not apply to any property which is part of the State Park System or sovereign tidelands and owned by the State of California on July 1, 1990.

[Section 1820 Adopted 11/6/90; Effective 12/10/90]

[Article XVIII Adopted 4/10/79}

[Article XVIII Amended 11/4/84; Effective 12/6/84]

Supreme Court, U.S.
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No. 98-1512

In The

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

On Petition For Writ Of Certiorari To The California Supreme Court

REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

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31 pp

Real Party's Restatement of the Question Presented

Whether the "essential nexus" and "rough proportionality" standards established by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in the context of property exactions, should be extended generally to regulatory takings cases whenever a claimant challenges the policy or effectiveness of legislation affecting a broad class?

List of Parties

The Petition does not state the parties to the proceeding below. They are Petitioner Santa Monica Beach, Ltd., a limited partnership, Respondent Superior Court of Los Angeles County, and Real Party in Interest Santa Monica Rent Control Board.

The First Amended Complaint in the Superior Court named as real parties in interest the following tenants: Dennis Power, David Cooper, Dennis Sevier, Robert Grossbard, Dorothy Constantine, Margarete Hell, Igor Medzhibovsky, Daniel Wax, Michael Hammerschmidt, Hai Vu, Christopher Cuse, Nadine Cuse, and Timothy Block.

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REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION

Real Party in Interest, Santa Monica Rent Control Board ("Board"), respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Santa Monica Beach, Ltd. ("Petitioner").

JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. § 1257(a). Real Party in Interest disputes this basis for jurisdiction on the ground that no "final judgment" has been rendered by the state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

In addition to those stated in the Petition, the following statute is involved:

Title 28, United States Code, Section 1257(a) states in pertinent part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . "

INTRODUCTION

This is a facial attack to a rent control law premised on the theory that the law fails to "substantially advance legitimate state interests." Rent control laws have come before this Court several times in recent years and have been upheld on each occasion. Accordingly, the Petition for Certiorari attempts to carve out a new legal theory for attack. This theory, however, would disturb decades of

settled takings jurisprudence and improperly subject every species of economic regulation to searching and constant judicial inquiry.

Petitioner asks this Court to adopt the following rule: the takings clause, unlike the due process clause, requires a close nexus between legislative means and ends for all economic regulation. While a related standard has been adopted in a narrow category of cases involving land use exactions, Petitioner now asks the Court to generalize it.

Heightened judicial scrutiny in land use exaction cases makes sense, because government conditions a discretionary permit on an applicant's concession of a possessory use of his property by strangers. This sort of "regulatory leveraging" invites abuses of the police power unless a close nexus between the permit and concession is shown.

No similar justification for heightened scrutiny applies to economic regulation in general, whether it is zoning, business regulation, or price control. The case law in this area recognizes that state and local legislatures make hundreds of policy decisions every day respecting social objectives and regulatory means. The "rational basis test" employed in such cases responds to the separation of powers concerns that would arise if courts routinely examined those policy choices for proof of their efficacy.

Petitioner rejects this precedent. It believes that "a decade of reinvigorated takings jurisprudence," Pet. at 14, makes its legal theory ripe for adoption by this Court. However, Petitioner has misread this jurisprudence and its significance outside the context of land use exactions. It has similarly misread cases from other courts to construct a conflict, one which disappears on close examination, leaving only the well established rule that rejects heightened scrutiny for general land use and price controls. There is no

need to revisit takings clause doctrine that has been settled for the past sixty years.

Even if further clarification of takings doctrine were necessary, this case would not be an appropriate vehicle for doing so. The case comes to this Court by way of an interlocutory appeal from partial dismissal of a multi-count complaint. While interlocutory review may have been appropriate in California courts, it is not in this Court since there is no final judgment. An "inextricably related" claim remains pending in the trial court through which Petitioner can obtain all the relief it seeks in the case.

Finally, the case is time barred. Although the California Supreme Court declined to reach the question, App. A-8, the law on this point is clear. Petitioner's claim was filed more than sixteen years after enactment of the challenged law. Even if this facial case accrued some years later, based on changed circumstances, the last such fact alleged in the complaint occurred five years before filing. In either event, this case is barred.

STATEMENT OF THE CASE

The Rent Control Law challenged in this case was adopted by the voters of Santa Monica in April, 1979. Twelve years later, Petitioner acquired a 12-unit apartment building in Santa Monica.[1] In addition to receiving automatic annual rent increases applicable throughout the City, Petitioner filed two applications for supplemental rent increases with the Board. The first, in 1992, is not before

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[1] Petitioner never alleged the date of its property acquisition. It is a matter of public record, however, and easily accessible through the Lexis database *CA Deed Transfers, Tax Assessor Records and Mortgage Records.* Real Party in Interest requests this Court take judicial notice of the date of acquisition, Dec. 17, 1991, pursuant to Fed. R. Evid. 201(b)(2).

the Court.[2] In March, 1993, Petitioner filed a second application for rent increase which was granted in substantial part.

In addition to requesting a rent increase, Petitioner's 1993 application claimed that the 1979 Rent Control Law effected a regulatory taking of property. That claim was denied. Petitioner then sought judicial review of the Board's decision by way of Petition for Writ of Administrative Mandamus under California Code of Civil Procedure § 1094.5.

In its First Amended Complaint, filed on May 15, 1995, Petitioner added a claim for Inverse Condemnation to its mandamus action. App. E-1. Both claims alleged that the 1979 law failed to "substantially advance a legitimate government interest" under *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), and therefore caused a "regulatory taking." App. E-7, E-10.

Petitioner alleged, *inter alia*, that rent control had caused gentrification in Santa Monica, with an attendant loss of low-income households. App. E-4. It further alleged that if rents had been unregulated (*i.e.*, higher), more low-income renters would remain in the City. App. E-8. Accordingly, under this theory, the Rent Control Law failed to achieve one of its stated purposes – to protect "the poor, minorities, students, young families, and senior citizens." App. F-1. Such a failure, Petitioner alleged, constitutes a regulatory taking, for which the Board must pay just compensation. App. E-9.

The Board demurred to the inverse condemnation claim, asserting that the heightened relational standard of

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[2] Petitioner apparently abandoned its first application on appeal. *See* App. E-5-6. In any event, allegations relating to the March, 1992 rent increase application are irrelevant to the present controversy.

Nollan and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), was inapplicable to normal regulatory action. App. A-6. The Superior Court granted the demurrer without leave to amend on Oct. 20, 1995. App. C-1. The court ruled that the "rational basis test" applied, App. D-4, since Petitioner had not alleged substantial economic injury or an exaction of property.

Rather than proceeding to trial on its administrative mandamus claim, Petitioner filed a Petition for Writ of Mandate in the California Court of Appeal, as a means of obtaining interlocutory review of the dismissed claim. The court issued its decision on March 20, 1996, holding that the heightened scrutiny standard of *Nollan* applies in all regulatory takings cases. App. B-13. The court vacated the demurrer granted by the trial court and remanded the inverse condemnation claim for trial. App. B-18.

The California Supreme Court granted review on May 29, 1996, and issued its decision on January 4, 1999. The court reversed the judgment of the Court of Appeal and reinstated the judgment of the trial court. The court held that "Petitioner remains free to proceed with its administrative mandamus action alleging that the Board exceeded its legal authority under the [Rent Control Law] and that the Board's rulings deprived Petitioner of a fair return." App. A-27.

The court read the decisions in *Nollan* and *Dolan* as establishing "essential nexus" and "rough proportionality" tests under the takings clause to "government requirements that property owners dedicate land as a condition of receiving a development permit." App. A-14. The court noted that the higher relational standards of *Nollan* and *Dolan* "cannot be readily transplanted outside the context of exactions," *id.*, and further noted that this Court has consistently declined to do so. App. A-16-18.

Petitioner's administrative mandamus claim remains dormant in the trial court five years after filing. The principal allegation contained therein is that the Rent Control Law is "invalid as a regulatory taking of private property." App. E-10. This claim is unaffected by the decision of the California Supreme Court except insofar as it relies on the substantially advancing prong of *Nollan* and *Dolan*. In other words, the decision below precludes one of Petitioner's theories, but does not finally adjudge the case.

REASONS FOR DENYING THE WRIT

I

THERE IS NO FINAL JUDGMENT

This Court has jurisdiction to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a).

> "This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' "

Jefferson v. City of Tarrant, 522 U.S. 75, 118 S. Ct. 481, 486 (1997) (citation omitted).

A. A Takings Claim Remains Unadjudicated in the Trial Court

The Petition seeks a writ of certiorari directed to the California Supreme Court to review its decision upholding

a demurrer to one claim of a two-claim complaint. The matter reached the state appellate courts by way of Petition for Writ of Mandate under Cal. Code Civ. Proc. § 1085, *et seq*. This is a customary mechanism in California to review interim orders that are not otherwise appealable because not final judgments. *See Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 743 (1994) (interlocutory judgment resolving fewer than all of plaintiff's causes of action is not appealable); *In re Matthews C.*, 6 Cal. 4th 386, 393 (1993). Review by writ is discretionary, especially at the pleading stage of a lawsuit. *Taylor v. Stille*, 24 Cal. 3d 890, 893 (1979). Review is appropriate where an interim order presents "significant legal" issues. *Babb v. Superior Court*, 3 Cal. 3d 841, 851 (1971). Yet, it is still an interlocutory review of a case which is "not final," *Morehart*, 7 Cal. 4th at 764, either under California procedure or for purposes of 28 U.S.C. § 1257(a).[3]

Because of the California Supreme Court's disposition of Petitioner's inverse condemnation claim, that decision is not subject to "further review or correction in any other state tribunal," and is therefore final within the first meaning of § 1257. But, it is not a final "determination of the litigation" as required by the second meaning of the statute.

Both the dismissed and remaining claims allege a regulatory taking. App. E-7, E-10. They rely on the same factual allegations, App. E-7, E-9, and seek similar relief –

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[3] Although the writ of mandate proceeding initiated in the California Court of Appeal is nominally a separate case, it is not the type that this Court has found sufficient under Section 1257. *Compare Fisher v. District Court*, 424 U.S. 382, 385, n.7 (1976) ("The writ of supervisory control issued by the Montana Supreme Court is a final judgment within our jurisdiction [because that] original proceeding . . . is not equivalent to an appeal . . . the only issue decided concerns the jurisdiction of a lower state court") (citations omitted).

compensation and invalidation of the law. App. E-13. Indeed, "[d]amages for the "taking" may be sought in an administrative mandamus action (Code Civ. Proc., § 1095)." *Hensler v. City of Glendale*, 8 Cal. 4th 1, 14 (1994).[4] Petitioner's two claims are therefore related, App. B-8, differing only in their underlying theories.

Accordingly, Petitioner's takings case is not over. The decision below merely dismisses one avenue of recovery because it was predicated on a novel theory of law not adopted by this Court or California courts. The traditional elements of Petitioner's taking claim remain pending in the trial court. *Cf. id.* at 15 ("the trial court is able to resolve the taking claim in the mandate proceeding").

This case is similar to and controlled by *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981). There, the California Court of Appeal (upon direction of the state Supreme Court) ruled that damages were unavailable for a regulatory taking of property and that the sole remedy was invalidation through mandamus or declaratory relief. This Court expressed doubt at the time regarding the correctness of this ruling, *id.* at 633, and has subsequently rejected it, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Nonetheless, the Court held the issue was not ripe for review.

> "The Court of Appeal has decided that monetary compensation is not an appropriate remedy for

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[4] California Code of Civil Procedure § 1095 states in relevant part: "If judgment be given for the applicant, the applicant may recover the damages which the applicant has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and a peremptory mandate must also be awarded without delay. Damages and costs may be enforced in the manner provided for money judgments generally."

> any taking of appellant's property that may have occurred, but it has not decided whether any other remedy is available because it has not decided whether any taking in fact has occurred. Thus, however we might rule with respect to the Court of Appeal's decision that appellant is not entitled to a monetary remedy – and we are frank to say that the federal constitutional aspects of that issue are not to be cast aside lightly – further proceedings are necessary to resolve the federal question whether there has been a taking at all. The court's decision, therefore, is not final, and we are without jurisdiction to review it."

450 U.S. at 633.

This case is also factually similar to *Jefferson v. City of Tarrant*. There, the Alabama Supreme Court sustained an objection to a Section 1983 claim, and thereafter remanded the case to the trial court for further proceedings.

> "Far from terminating the litigation, the [Alabama Supreme] court answered a single certified question that affected only two of the four counts in petitioners' complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims."

118 S. Ct. at 483.

B. None of the Exceptions to the Final Judgment Rule Applies

This is not a case in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420

U.S. 469, 480 (1975). As in *Jefferson*, "[r]esolution of the state-law claims could effectively moot the federal-law question raised here." 118 S. Ct. at 483. If Petitioner prevails on its state mandamus claim, because either the Rent Control Law constitutes a regulatory taking (under settled standards), or the Board exceeded its statutory authority, App. E-10-12, it will obtain full relief.

Nor is this an instance "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. Admittedly, trial of the regulatory taking allegation in Petitioner's mandamus claim will proceed, if at all, using traditional Fifth Amendment standards. And, presumably, that will be "law of the case" on appeal in the California state courts. Nonetheless, ultimate review could still be had in this Court, as the state courts' "determination will in no way limit [this Court's] ability to review the issue on final judgment." *Jefferson*, 118 S. Ct. at 483.

The third exception under *Cox* – "the federal issue is conclusive or the outcome of further proceedings preordained," 420 U.S. at 478 – likewise does not arise here. Petitioner will be required to go to trial on his complaint no matter how the "substantially advancing" issue is resolved. For the same reason, the fourth exception fails. That occurs where "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83.

Common to all the exceptions under *Cox* is that "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date." 420 U.S. at 477-78. Yet, in this case, either party if unsuccessful can bring the takings issue before this Court at a later and more appropriate time. *See*

San Diego Gas & Electric, 450 U.S. at 636 (Rehnquist, J. concurring).

II.

PETITIONER'S INVERSE CONDEMNATION CLAIM IS TIME BARRED

Petitioner's inverse condemnation claim alleges a violation of the Fifth Amendment.[5] App. E-7. Because it is a federal claim, it is governed by the applicable federal statute of limitations. Here, however, the federal right does not provide a statute of limitations. In such situations, federal courts generally adopt the analogous state statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985).

Petitioner filed its inverse condemnation claim on May 15, 1995, sixteen years after the Rent Control Law was enacted. Assuming that Petitioner's cause of action may have accrued sometime thereafter, because of changed circumstances, the events complained of occurred sometime "between 1980 and 1990." App. E-3-4. Since California's statute of limitations for facial claims for inverse condemnation is five years, App. A-7, the complaint is time barred no matter when the cause of action accrued. Indeed, recent Ninth Circuit authority sets the California limitations period at one year. *See Golden Gate Hotel Ass'n v. San Francisco,* 18 F.3d 1482, 1486 (9th Cir. 1994) (one year limitation applies to facial taking claim which accrued when ordinance was enacted).

Petitioner attempts to evade this fatal defect by characterizing its case as an *as-applied* challenge. Pet. at i, 3. However, none of the allegations forming the basis for

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[5] It also alleges a violation of a comparable provision in the California Constitution, Art. I. § 19, which is not before this Court.

Petitioner's claim allege any impact on its own property. Rather, the complaint compares certain City-wide demographics between the 1980 census and the 1990 census which, Petitioner contends, prove the Rent Control Law is ineffective in meeting its goals.

In order to make an *as-applied* taking claim, a party must allege facts showing "the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Ass'n v. De Benedictis,* 480 U.S. 470, 494 (1987). By contrast, the issue in a facial challenge is the effect of the statute itself. *Id. See also Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring and dissenting) (analysis of whether a law substantially advances a legitimate state interest is facial in nature). Petitioner's allegations are a classic example of a *facial* attack, since they purport to describe the effect of the law itself and not any particularized impact on its property.[6]

Petitioner's administrative mandamus claim, still pending below, was timely filed. *See* Cal. Code Civ. Proc. § 1094.6. But the claim it brings to this Court was not.

III.

THE STANDARD FOR REVIEW OF PRICE CONTROL REGULATIONS (INCLUDING RENT CONTROL) IS WELL SETTLED; THERE IS NO NEED FOR FURTHER GUIDANCE FROM THIS COURT

The Petition for Certiorari paints a picture of disarray in the lower courts concerning the standard of review

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[6] Because Petitioner has mounted a facial challenge to a law in existence at the time it acquired the property, it may lack standing in this case. *See Pennell*, 458 U.S. at 8, n.4.

applicable under the takings clause to economic regulation. Any uncertainty, however, is more illusory than real. As we show below, this Court's pronouncements have been clear, and were correctly applied by the California Supreme Court in its decision.

A. The Petition Rejects the Central Inquiry in Regulatory Takings Cases – The Challenged Law's Economic Impact

This Court has identified three factors of "particular significance" in its takings cases – "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Kaiser-Aetna v. United States*, 444 U.S. 164, 175 (1979).

Most takings decisions are based on these factors. The first two are essentially economic inquiries and form the basis for analysis in regulatory takings cases. The third – the character of governmental action – speaks to the special case of "physical invasion by government," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), or comparable destruction of critical property rights. *See Hodel v. Irving*, 481 U.S. 704, 715-16 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Petitioner, however, invoked none of these factors, either in the lower courts or here. Instead, Petitioner seeks review of the constitutionality *vel non* of rent control. It does so by relying on abstract principles rather than the specific tests carefully crafted by this Court. Its ostensible justification is that "[r]ent control differs from and cannot be equated to other forms of price control . . . . [Therefore,] decisions upholding other forms of price control are [not] authority for rejecting a takings clause challenge to a rent

control ordinance." Pet. at 9-10 (quoting App. A-56-57 (Baxter, J., dissenting)).

The constitutionality of rent control is not an open question after 78 years of decisions, given its affirmance by this Court no fewer than a half-dozen times since *Block v. Hirsch*, 256 U.S. 135, 156 (1921). Indeed, the Court has been quite clear – "statutes regulating the economic relations of landlords and tenants are not per se takings." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). *See also Loretto*, 458 U.S. at 440 ("[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails"); *Pennell*, 485 U.S. at 12, n.6 ("we see no need to reconsider the constitutionality of rent control *per se*").

Should the constitutionality of rent control be revisited by this Court, this is not a suitable case for doing so, since it is not premised on economic injury or other factor that distinguishes the Petition from the myriad other cases challenging the policy justification for rent control.[7]

B. Petitioner Seeks to Introduce Substantive Due Process Elements Into the Takings Clause, Thereby Undoing this Court's Efforts to Maintain Conceptual Distance Between the Clauses.

Rent control is a form of price control which, like other economic regulation, can be analyzed under either the takings or due process clauses. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 532 (1992). The two clauses

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[7] Nor does this case present the type of severe retroactive exactions found in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).

serve different purposes and employ different standards. *See Pennell*, 485 U.S. at 15 (Scalia, J., concurring and dissenting); *Nollan*, 483 U.S. at 835, n.3.

The distinction between the two clauses has not always been clear. Early in the century, this Court's opinions often used the clauses interchangeably, or failed to indicate which was involved in its analysis. *See Chastleton v. Sinclair*, 264 U.S. 543 (1924) (no clause identified); *Block v. Hirsch*, 256 U.S. at 156 (intermingling of takings and due process clauses). To some extent, the interplay between the clauses was unavoidable. The takings clause, after all, is made applicable to the states by way of incorporation through the Fourteenth Amendment's due process clause. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

For the last sixty years, however, this Court has endeavored to distinguish between the clauses and has generally rested its review of land use regulations and price control on the takings clause. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1988). Where both clauses are invoked by a complaining party, the Court has expressly declined to treat them as interchangeable. *See, e.g., Pennell*, 485 U.S. at 13; *Yee*, 503 U.S. at 532.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court stated:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests, *see Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978)."

447 U.S. at 260 (emphasis added).

The "substantially advancing" component is, of course, a means-ends inquiry. Its due process pedigree is apparent from *Agins'* reference to *Nectow*, a substantive due process case. As a result, some read *Agins* as merging the due process and takings clauses, with the "substantially advancing" prong as potent a limitation on economic regulation as the requirement of viable economic use.

But that has not proven to be the case. Rather, this Court's decisions have focused almost entirely on economic impact when reviewing regulatory takings. This is as it should be. The entire premise of regulatory takings theory, according to Justice Holmes, is to guard against police power enactments which extinguish property; *i.e.*, those that have "very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

To the extent a means-ends inquiry remains part of regulatory takings, it is employed using deferential rational basis review. It would make no sense to do otherwise. No rationale can explain why a takings clause test borrowed from economic due process should continue to employ *Lochner* era standards (*cf. Lochner v. New York*, 198 U.S. 45 (1905)), while the due process clause itself has matured into a minimal restraint on regulatory action. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986) ("it would be surprising indeed to discover that [a law that survived economic due process analysis] effected a taking").

C. This Case Does Not Fall into The Narrow Category of Unconstitutional Conditions Which Require an "Essential Nexus" and "Rough Proportionality."

This Court has identified a single exception to rationality review under the takings clause. That is for land use

exactions involving physical occupations. Land use exactions are a special case of "unconstitutional conditions."

The "substantially advancing" test received its first full airing from this Court in *Nollan*. There, the California Coastal Commission had granted a discretionary development permit conditioned on the owner's surrender of a piece of his property – a lateral easement across his beachfront. Standing alone, the condition would have been unconstitutional. 483 U.S. at 837 (the "permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit"). Such a condition passes constitutional muster, however, if it "serves the same governmental purpose" as the underlying regulation (in *Nollan*, to preserve view easements). *Id.* In other words, if the Commission could have denied the permit outright, giving the "owner an alternative to that prohibition which accomplishes the same purpose is not [unconstitutional]." *Id.*

Thus, the distinction between a constitutional and unconstitutional permit condition is whether the condition tracks the regulatory purpose. As Justice Scalia noted, absent a close fit between the two, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* This, then, is the backdrop and predicate for close scrutiny under the "substantially advancing" prong. It is limited to discretionary permits containing conditions which are otherwise unconstitutional.

The limited use of close scrutiny under the "substantially advancing" prong was confirmed in *Dolan*. As in *Nollan*, the condition imposed – dedication of land – standing by itself, would have resulted in a taking. 114 S. Ct. at 2316. Because of this feature, the traditional economic impact analysis used in most land-use cases was not dispositive. Chief Justice Rehnquist explained:

> "[Typical] land use regulations . . . differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city. In Nollan, supra, we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Id. at 2316-17.

The present case is a far cry from the conditional permits in *Nollan* and *Dolan*, which gave rise to the requirements of "essential nexus" and "rough proportionality." There is no dedication or other exaction which is independently unconstitutional. There is also no permit involved, which could serve as the basis for improper "regulatory leveraging." *Cf. Nollan*, 483 U.S. at 841. Finally, application of the Rent Control Law to Petitioner is not an individualized discretionary action. *See Dolan*, 512 U.S. at 385. Petitioner complains that the legislative decision enacting rent control for the entire City lacks foundation.

Petitioner does not contend that it can prevail on its claim if the traditional standard is used for determining

"substantial advancement." Its avoidance is well advised, for this Court has consistently affirmed a legitimate public purpose for rent control. *See Block v. Hirsh*, 256 U.S. at 156 (1921) ("all the elements of a public interest" are present); *Bowles v. Willingham*, 321 U.S. 503, 513, n.9 (1944) (rent control advances a legitimate public purpose); *Pennell*, 485 U.S. at 13.

D. The Demurrer Was Properly Sustained Irrespective of the Standard of Review On Petitioner's Inverse Condemnation Claim.

Petitioner argues that, for purposes of this appeal, the facts in its complaint "must be deemed proven." Pet. at 17. That is true for evidentiary facts, but not for legal conclusions, such as whether the Rent Control Law has a sufficiently close nexus to a public purpose.[8] Moreover, Petitioner poses that ultimate question in two distinct ways, thereby clouding the precise issue before the Court.

To make the case attractive for review, Petitioner posits the relational (nexus) standard in general terms, and cites to statements in opinions below asking for guidance on whether to apply *Nollan* and *Dolan* outside of exactions. Pet. at 8, 17-18. But attempting to avoid the statute of limitations problem, Petitioner posits this is an *as-applied* challenge, not a *facial* one. App. A-7-8. Accordingly, it

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[8] *See Moore v. Regents of the University of California*, 51 Cal. 3d 120, 125 (1990) ("in reviewing a ruling on a demurrer . . . we assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law") (internal citations omitted); *Agins*, 447 U.S. at 259, n.6 (California Supreme Court's treatment of allegations on a demurrer "does not raise a federal question appropriate for review by this Court").

frames the question for this Court as whether "*application of the Rent Control Law [to Petitioner]* failed to advance . . . the legitimate policy objectives of the law." Pet. at 4 (emphasis added). *See also id.* at i.

Yet, none of the facts alleged in the First Amended Complaint go to the issue of whether the Rent Control Law, *applied to Petitioner's property*, does or does not assist "the poor, minorities, students, young families and senior citizens," or serves any other public purpose. Pet. at 5. Every fact alleged in the complaint is general to the population of Santa Monica as a whole. Nowhere does Petitioner describe the impact of rent control on tenants in its own building. App. E-3-4. *See also* Pet. at 4-5.

In other words, if this truly were an *as-applied* case, Petitioner would have to show the requisite "close nexus" is lacking between the regulatory decision below "and any public harm that might result from plaintiff's unregulated operation of the Property." App. E-8. Yet, as Petitioner's own authorities recognize, this requires allegations showing "the amount of public harm caused by the owner and the regulatory burden imposed." Pet. at 19-20 (citing Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw.U.L. Rev. 591, 602 (1998)). *See also* Pet. at 22 ("substantial advancement test 'requires a judicial assessment based on the facts of each owner's use' ") (citing McUsic). No such allegations appear.

Since not a single fact alleged in the complaint goes to the particular question presented, the demurrer was properly sustained quite apart from the correct standard of review for the "substantially advancing" prong of *Agins*.[9]

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[9] *See also* App. A-10, n.2 ("Petitioner does not allege with any particularity in its inverse condemnation claim that the Board's decisions denied it a fair return, reserving such allegation for the administrative mandamus action, which is not before us").

E. The Decision Below Does Not Conflict With the Cases Cited by Petitioner

Petitioner cites *Seawall Associates v. City of New York*, 74 N.Y.2d 92 (1989), *cert. denied*, 493 U.S. 976 (1989), and *Manocherian v. Lennox Hill Hospital*, 84 N.Y.2d 385 (1994), *cert. denied*, 514 U.S. 1109 (1995), for its contention that there is a conflict between the courts of California and New York regarding the standard of review in regulatory takings cases. Since these cases are distinguishable from the decision below, no conflict exists.

Seawall found facially unconstitutional a law which prohibited demolition or conversion of single room occupancy hotels and required owners to rehabilitate and rent every unit. 74 N.Y.2d at 99-100. The court found that the law affected a physical occupation because it denied an owner's right to possess and exclude others. The court distinguished typical rent control laws which do not result in a physical taking. *Id.* at 105.

Manocherian is similar. The law there transferred significant possessory rights to a small class of corporate tenants who could select and evict actual occupants of the premises. 84 N.Y.2d at 394. Again, the court distinguished typical rent control laws, stating: "by no means does our ruling affect or diminish the general validity of those broad, longstanding [rent control] protections and enactments." *Id.* at 398-99.

Nor does the decision below conflict with *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 119 S. Ct. 168 (1998). *Richardson* involved price caps and tenancy protection for condominium ground lessees. Because the lease savings inured to the benefit of owner-occupants who sell their units, rather than to new tenants, the court found the law failed to meet its goal of keeping housing affordable. *Id.* at

1163-66. The court distinguished the Hawaii law from "ordinary rent control ordinances," which do not produce such a premium. *Id.*

In sum, the cases on which Petitioner relies for its claim that review is needed in this Court are self-limiting. Because they distinguish themselves from ordinary economic regulation (including rent control), there is little likelihood that other courts will confuse them with the decision below.

CONCLUSION

By subjecting rent control to heightened judicial scrutiny, Petitioner seeks to supplant the legislature's economic judgments with its own. Thus, if it can convince a court or jury that rent control fails to serve a salutary public purpose, the law must be unconstitutional. This theory apparently succeeded in the California Court of Appeal. *See* App. B-17 ("the political objectives that are furthered by rent control are of dubious legitimacy") (citing R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control* (1992) 21 Sw.U.L.Rev. 1019, 1065)).

This is the stuff of economic substantive due process, whether now couched in the takings clause, or more accurately seen as resurrecting *Lochner v. New York*. Subjecting the "economic niceties" of price control, *Duquesne*, 488 U.S. at 314, to heightened judicial scrutiny would accomplish just that. This inquiry is inevitable if, as Petitioner demands, close judicial scrutiny of means and ends is required whenever the legislative basis or effectiveness of economic regulation is challenged under the takings clause.

Indeed, under Petitioner's theory, mere allegation of no substantial advancement should be enough to deter police power enactments. Perhaps this is why Petitioner believes it is unnecessary to adjudicate its remaining claim

in the trial court. But, the "finality rule is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Jefferson*, 118 S. Ct. at 486 (citations omitted). In this case, it precludes interlocutory review of Petitioner's takings claim.

For the foregoing reasons, Real Party in Interest respectfully requests that the Petition be denied.

Dated: April 20, 1999

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-1512

In The

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Since 1941, *amicus curiae* California Apartment Association[1] ("the Association") has actively promoted the general welfare of the housing industry, including activities for the betterment of the communities in which its members transact their business, for the betterment of the relationships between landlords and tenants, for the betterment of the state's residential rental housing stock, and for the betterment of the social and civic conditions of the state of California and the nation.[2] Throughout its history, the California Apartment Association has supported many of its members in litigation to advance these efforts.

The Association is the largest statewide rental housing association in the United States. The Association is comprised of 19 regional chapters.[3] It has approximately

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[1] This brief is submitted with the written consent of all parties, filed with the Clerk of the Court. It was prepared exclusively by *amicus'* counsel at *amicus'* exclusive expense.

[2] The California Apartment Association was initially incorporated as the California State Apartment Conference.

[3] The Association is comprised of the following nineteen regional chapters: Action Apartment Association, Apartment Association of Greater Inland Empire, Apartment Association of Monterey County, Central Coast Rental Housing Association, Fresno Rental Housing Association, Kern County Apartment Association, Marin Income Property Association, North Coast Rental Housing Association, Rental Housing Association of Contra Costa, Napa and Solano Counties, Rental Housing Association of Northern Alameda County, Inc., Rental Housing Association of Sacramento Valley, Rental Housing Association of Central California, Rental Property Association of Merced County, Rental Property Owners' Association of Southern

18,500 individual members, who own or manage approximately 1.5 million units of residential rental housing in the state of California. Throughout the state, chapters and individual members of the Association have been and are involved in determining policies that affect the housing resources of the state.

Five of the Association's chapters are currently affected by rent control ordinances. In these jurisdictions, individual Association members are prohibited from collecting market rents by rent control ordinances that purport to correct social ills such as losses of poor, minority, young family and elderly tenants. But Association members in these areas far more frequently subsidize affluent, non-minority, non-young families, and non-elderly tenants at rents significantly below market rates – as a direct result of rent controls. Indeed, just as Santa Monica Beach originally alleged, the number of such tenants has dropped since the inception of rent controls, demonstrating that rent controls have failed to achieve their stated objectives.

The landlord in *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 81 Cal. Rptr. 93 (1999) is attempting what many landlords in rent-controlled jurisdictions would like to do – *prove by objective facts and evidence that rent controls exacerbate the very social problems they were meant to relieve.* The Association believes, and *Santa Monica Beach* is just one example, that rent controls are a

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Alameda County, San Diego County Apartment Association, San Francisco Apartment Association, San Joaquin Rental Property Association, Inc., South Coast Apartment Association, Tri-County Apartment Association.

reflection of failed housing policies that force individual landlords to pay for residential rental housing for all tenants because the state is unwilling or unable to effectively deal with the problem. But as long as the courts refuse to permit landlords to question the result of the application of these ordinances, property owners will remain the victims of paralyzed legislatures, and their property will continue to be taken without conferring any benefit to those tenants the ordinances were intended to benefit, all without just compensation.

At least eight communities are currently actively considering adopting rent control ordinances. Unless rent controls are applied to achieve their legislative purposes, adoption of such ordinances will merely hasten the exclusion of the poor, minorities, young families and elderly from rent-controlled communities.

The decision below blatantly disregards this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and effectively erases it from the books. Moreover, it reverses the thoughtful and reasoned decision of the court of appeal, and presents a sharply divided court, where three associate justices dissent, and one concurring associate justice actually seeks this Court's guidance! If that guidance is not provided, landlords in California and other jurisdictions will continue to struggle with the inequities of rent controls, with no relief in sight.

Santa Monica Beach merely wants the opportunity to prove that the rent controls that prohibit it from collecting market rents, and the forfeited rents themselves, do not and cannot meet the ostensible goals of the rent

control ordinance. It wants the opportunity to show that the tens of thousands of dollars it has been forced to forgo, and every lost dollar of lost future rent, has provided no advancement of the legislative purpose whatsoever – that these takings of actual dollars have served no purpose at all. But the lower court would deprive Santa Monica Beach of that opportunity, holding that as long as the *court* could *imagine* any possible benefit to *any possible recipient* – without regard to facts or evidence – no taking has occurred.

Santa Monica Beach's petition for *certiorari* presents issues important to every residential property owner:

Do rent control ordinances which demonstrably exacerbate the social problems they were ostensibly intended to reduce, constitute a taking of property in violation of the Fifth Amendment?

Should a landlord be prevented from challenging the application of a rent control ordinance simply because it states socially desirable goals even though he can allege and prove facts to show that it has the opposite effect?

STATEMENT OF THE CASE

California is the nation's most populous state, leading the way into the next millennium, currently challenged by many social problems that will reach sister states only in future decades. Housing for an increasing and diverse population is one of the state's chief concerns.

To date, fourteen jurisdictions in California have adopted rent controls, either by initiative or by ordinance. Landlords throughout California find themselves politically outnumbered by tenants and other housing advocates, and abandoned by state and local legislators, who see private landlords as the primary housing providers for the state. They see rent controls as a panacea for all the social ills that the state and local municipalities cannot or will not address – it is simply easier to force existing property owners to forfeit market rents to assuage tenant demands than it is to develop housing and housing policies which ensure adequate housing for all of the state's population. Since landlords are less numerous than tenants, the political fallout of rent controls is less threatening to legislators on every level.

A review of the ostensible goals of some of the rent controls enacted in California jurisdictions is illuminating. Each enumerates the same winning formula for passage:

> There is a shortage of decent, safe and sanitary housing the City of Los Angeles resulting in a critically low vacancy factor . . . .
>
> . . . . This situation has had a detrimental effect on substantial numbers of renters in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income households . . . .

City of Los Angeles, Los Angeles Municipal Code Chapter XV, Section 151.01.

> There is a shortage of decent, safe and sanitary housing in the City and County of San Francisco resulting in a critically low vacancy factor. . . .

> . . . . This situation has a detrimental effect on substantial numbers of renters in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income households . . . .

City and County of San Francisco, San Francisco Administrative Code Section 37.1(b)(1) and (2).

> On July 1, 1983, the City Council established a moratorium of rent increases for residential housing in the City of East Palo Alto, based upon the Council's findings of a pattern of excessive rent increases, a shortage of decent, safe and sanitary housing, and the resultant displacement of tenants due to their inability to pay increased rents. The Council found that the foregoing conditions created hardships for senior citizens, persons on fixed income and low and moderate income households.

City of East Palo Alto, City of East Palo Alto Ordinance 076, Section 2.A.

> . . . . The present shortage of rental housing units and the prevailing rent levels have a detrimental effect on the health, safety, and welfare of a substantial number of Oakland residents, particularly senior citizens, persons in low and moderate income households, and persons on fixed incomes who reside in the City.

City of Oakland, Ordinance 11758, Section 1.

> The purposes of this chapter are to regulate residential rent increases in the city of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to

> ensure compliance with the legal obligations relating to the rental of housing. This legislation is designed to address the city of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the city with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

City of Berkeley, Berkeley Municipal Code Section 13.76.030.

> The City Council hereby finds that there presently exists a critical shortage of rental housing within the City and surrounding areas . . . .
>
> . . . A substantial number of persons in the City who rent apartments are age sixty-five (65) or older and spend a high proportion of their income on rent. When low and moderate income tenants are displaced as a result of rent increases that they cannot afford to pay, they have extreme difficulty finding affordable apartments within the City . . . .

City of West Hollywood, Article VI, Chapter IV, Section 6401.

The stated goals of rent controls are socially responsible and admirable. The Association has no quarrel with them. But the actual results of rent controls are obvious and predictable, and deprive landlords of market rents *for no purpose*. This undeniably results in an unconstitutional taking without compensation.

ARGUMENT

I.

SANTA MONICA BEACH MUST BE PERMITTED TO SHOW THAT SANTA MONICA'S ORDINANCE DOES NOT SUBSTANTIALLY ADVANCE THE GOVERNMENT'S INTEREST, AND SO CONSTITUTES A TAKING.

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. Statutes take property if they do not substantially advance legitimate state interests. *Nollan*, 483 U.S. at 835, fn. 3. In *Nollan*, this Court found that the state's taking of an easement did little to advance the justification for the justifying statute, constituting a taking without just compensation.

Nollan required consideration of the *results* of the statute, not just its stated goals. The Court considered not just the language of the statute, but the *actual evidence* of the effects of the statutory taking. Not only must the statute advance the state's interests, that advancement must be *substantial*.

Indeed, this Court held

> the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original).

The Santa Monica ordinance cannot meet this standard. The facts and evidence alleged by Santa Monica Beach directly challenge the ordinance's ability to do so. Yet Santa Monica Beach was not even permitted to make its showing at the trial court.[4] But the lower court found the ordinance in compliance with the Fifth Amendment through "imagination", opining about the possible benefits of rent controls in the face of contrary factual allegations.

Santa Monica Beach intended to present evidence that rent controls generally freeze rents, and permit across-the-board increases only for inflation. Many ordinances, like Santa Monica's, prohibit increases even upon a vacancy, continuing the same rent level from year to year, tenant to tenant, with only a fraction of the inflation rate increase from year to year.[5] The result after about twenty years is rents half of market rates, or even less, benefiting whoever the tenant may be – not just the classes described in the ordinance.

Controlled rents discourage development, since developers distrust communities that may deprive them of profits after development. Owners of existing units

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[4] One might ask the obvious question why the respondent is not eager to have its ordinance challenged by facts and evidence, and assume it knows that its ordinance could not meet any standard dependent on actual results.

[5] And to put teeth into these ordinances, they prevent evictions of tenants for all but specifically enumerated "good causes," so landlords cannot terminate for any but permitted grounds, which makes it impossible to terminate for drug dealing and prostitution, or even to refurbish an apartment.

seek ways to exclude themselves from rent controls, usually by converting to some form of owner-occupancy. This is particularly evident with single-family homes where considerable numbers of rental homes are sold from the rental housing stock to owner-occupancy, significantly reducing the family-based rental housing opportunities.

Controlled rents discourage small owners. Rent control programs must control every aspect of housing services, from utilities, to parking, to storage, to furnishings, with complex regulatory schemes involving hundreds of regulations changing frequently. These sophisticated issues discourage small landlords from maintaining their property, and they ultimately sacrifice it to corporate landlords more capable of handling intricate procedures.

Controlled rents lead to a more affluent tenant population. Tenant competition heightens with limited supply and arbitrarily frozen rents, so landlords seek the best financially qualified applicants, which leaves out the poor, and generally minorities, young families and the elderly. Tenant competition increases as affluent prospective tenants move into the community from outside areas, lured by the promise of artificially controlled rents.

Controlled rents result in fewer tenants overall. Tenants can get more for less, so the number of tenants in each unit drops. More affluent tenants use greater space, so more units have fewer occupants.

The result of rent controls? Less development, fewer units available, fewer poor, minority, young family and elderly tenants, competition from tenants outside the community, and fewer tenants in fewer units overall.

Rent controls not only do not achieve their objectives, but as they are applied in Santa Monica and other jurisdictions, they cannot.

These are the *facts* of rent control that Santa Monica Beach alleged in its complaint in *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*, 968 P.2d 993 (1999). These are the *facts* that the California Supreme Court held Santa Monica Beach could not be allowed to prove, since the court could *imagine* otherwise. These are the *facts* that prompt Santa Monica Beach to ask why it should be required to forgo market rents when that sacrifice has not achieved any purpose, and has intensified the problem.

Petitioner's questions are faced by California landlords every day in substantive ways. Landlords in municipalities that have adopted rent controls know, and can prove, that rent controls do not cure, but in fact exacerbate, the ills they are ostensibly intended to correct. But these same landlords continue to be forced to subsidize those for whom no benefit was ever intended, without compensation, and to exclude those for whom the ordinance was intended. The decision of the California Supreme Court compels these property owners to continue to endure the hardships of rent controls because the ordinances purport to better the community, while prohibiting these landlords from proving that these same ordinances do not.

The word "ostensibly" is used intentionally, and for good reason. If rent controls do not advantage the elderly, minority, small family and poor, whom do they benefit? The vast majority of tenants benefited have no special needs, and are not deserving of special governmental

concern. But, since they outnumber landlords, their will can be and is asserted to force landlords to subsidize them.

Surprisingly, or perhaps not so, not a single rent control ordinance in California provides for any tenant to qualify for rent controls. Not a single ordinance limits its effects to those it intends to benefit. Not a single ordinance even attempts to focus the resources of the landlords on the persons who meet the criteria of their enabling findings. Every rent control ordinance governs all rents for virtually every residential rental unit, for the benefit of any tenant who might live there.

The lower court held that as long as any tenant benefited from rent controls, a rational basis exists. But what does that mean in real life? In locations with a limited housing supply, tenants compete. The lower the rents, the greater the competition. If any tenant without special circumstances who benefits justifies rent controls, then that tenant deprives another with special circumstances from benefiting. That is the start of the exodus from rent controlled jurisdictions by those less financially capable.

This is the heart of the Takings Clause, which the framers intended to protect the minority from the power of the majority. The *only* reason for a taking is to substantially advance a legitimate government interest, and that advancement must be real, not imagined. If the real result is depressed rents for tenants not deserving of government protections, then landlords are being singled out to provide a general public benefit which should be borne by the public as a whole. *Armstrong v. United States*, 364

U.S. 40, 49 (1960). If the real result is depressed rents which exclude the tenants who are deserving of government protections – and the lower court conceded that it is – then there is by definition no government purpose at all and a taking has absolutely occurred.

Moreover, by holding that the municipalities face no accountability for their rent control ordinances, the decision of the California Supreme Court is an open invitation to communities to adopt rent controls by promising their citizenry the same lofty objectives promised to currently rent-controlled communities – affordable housing for the poor, minorities, young families and the elderly, and maintenance of diversity and a healthy housing stock. The same promises can and will be made to voters in other communities, who may respond with well-meant but entirely misplaced support to deprive landlords of their property, rather than working to adopt housing policies to be borne by the public at large.

In communities such as Santa Monica, the rent control ordinance has been passed by the city council, which owes its electoral soul to the larger voting bloc – tenants. In communities such as Berkeley, the rent control ordinance was the subject of initiative, passed by the voters with promises of responsible social engineering. Once passed, it is nearly impossible to demonstrate to the majority of voters – again, mostly tenants benefiting daily from depressed rents – that they should repeal the law because it harms others. Those benefiting are without special needs, but even they have no reason to vote against their self-interest, and so the law and its inherent unfairness is perpetuated.

As a result, property owners and the Association look to the Courts for relief.

The Constitution establishes a tripartite system of checks and balances, by which the executive and legislative branches are kept in check by the judicial. If either exceeds its authority, the courts are the refuge for the powerless. This is particularly true where the legislative or executive branches are responsive to the majority – the courts are the refuge of the less numerous and less powerful. But if the courts deliberately turn a blind eye to the actual proof that the executive or legislative branches have exceeded their authority and are exploiting the minorities, then minorities are sacrificed to the majority, and unconstitutional exploitation is encouraged.

The decision of the California Supreme Court in *Santa Monica Beach* is an open invitation for every political interest in every jurisdiction to imagine a socially responsible reason for rent controls (or any other ostensibly socially responsible legislation) and convince voters to pass them. If it turns out later that the law does not advance its stated goals, the California Supreme Court would say that as long as the reason was a good one to begin with, and it can imagine a rational connection, the law is valid, and no taking has occurred. In fact, the California Supreme Court would say that as long as the voters can be persuaded of a good reason just once, the law will forever stand even if the result is entirely contrary.

If that is the law, then the real minority, the property owners, have been victimized by the majority and abandoned by the courts.

The Association does not contend that no rent control law can pass Constitutional muster. Nor does it contend that the admirable stated goals of the Santa Monica ordinance and the others cited herein are misplaced. But it does contend that because these ordinances do not achieve their goals, and in fact impede them, the disproportionate burden placed on landlords without compensation is entirely without purpose and is therefore unconstitutional.

CONCLUSION

For each of these reasons, the Association respectfully requests that this Court grant Santa Monica Beach's petition for a writ of *certiorari* to review and overturn the decision below, which contravenes the authoritative decision of this Court, and denies landlords of any opportunity to prove statutory takings claims in the manner recognized by this Court.

Dated: April 21, 1999 Respectfully submitted,

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Supreme Court, U.S.
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(5)

No. 98-1512

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

Petition for Writ of Certiorari to the California Supreme Court

BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

Amicus curiae Western Mobilehome Parkowners' Association (*"amicus"* or "WMA") is the leading trade association for California's mobilehome and manufactured housing industry. WMA is a nonprofit, tax-exempt organization organized under the laws of California.[1]

[1] This brief is submitted with the written consent of all parties, filed with the Clerk of the Court. It was prepared exclusively by *amicus'* counsel at *amicus'* exclusive expense.

WMA's members include owners and operators of more than eighteen hundred mobilehome and manufactured housing communities throughout California. Rent controls, regulations of land use and constitutional protection of property rights are matters of great interest to WMA members.

Under the Takings Clause of the Fifth Amendment, regulations take private property when they do not substantially advance a legitimate purpose. *Agins v. Tiburon,* 447 U.S. 255 (1980) (*"Agins"*); *Nollan v. California Coastal Commission,* 48 U.S. 825 (1987) (*"Nollan"*). This petitioner alleges that Santa Monica's strict regulation of rents, evictions and conversion of rental property impose substantial costs and burdens upon owners, and operate perversely to defeat their stated purposes. This Court has ruled that the constitutional standards are more than a pleading requirement, and demand more than surmise concerning possible rational bases for legislation. *Nollan,* 483 U.S. 835 n.3 and 841.

Nonetheless, a divided California Supreme Court limited *Nollan* and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) *("Dolan")* to their facts, holding that Santa Monica's rent law deserved greater deference, since the challenged regulations were legislation, rather than permit requirements. Legislation, the California court ruled, should be sustained unless proved arbitrary. Since achievement of some unstated goals could be presumed, the California court denied Santa Monica Beach any opportunity to prove that Santa Monica's law has, in fact, exacerbated the shortage it was supposed to alleviate, and driven away the less fortunate and older residents — while subsidizing favored voters at the property owners' expense.

These are factual issues, capable of proof (or disproof) through expert and other evidence of market activity and the law's effects over nearly 20 years of operation. *Amicus*

believes that under *Nollan, Dolan* and other authoritative interpretations of the Takings Clause, Santa Monica Beach is entitled to its day in court, so that a trial court may decide, after considering all relevant evidence, whether Santa Monica's law does or does not substantially advance a legitimate purpose.

Unless property owners are allowed an opportunity to prove their claims, judicial conjecture about intentions and effects may become a shield for uncompensated, and therefore unconstitutional, appropriations of property; and the "substantial advancement" standard laid down by this Court will be reduced to little more than the theoretical exercise of attempting to divine a rational basis. This Court has "required that the regulation 'substantially advance' the legitimate state interest sought to be achieved . . . not that 'the State *could rationally have decided*' that the measure adopted might achieve the State's objective." 483 U.S. 834 n.3 (emphasis by the Court).

Dissenting and concurring opinions below invite this Court's scrutiny, and together with the petition, identify important issues of first impression, including (i) the application of *Agins, Nollan* and *Dolan* to restrictive legislation, (ii) conflicts between California precedents and this Court's, as well as (iii) precedents in the 9th Circuit and New York.

Rather than revisit these important issues, *amicus* intends to review Santa Monica's rent law in its historical context, compare its operation and effects with *Nollan* and *Dolan,* and explain why regulations restricting property, when challenged under the Takings Clause, deserve the kind of scrutiny that can only come through trial of the merits.

STATEMENT OF THE CASE

Santa Monica Beach claims that Santa Monica's rent control law — renowned by friend and foe alike as one of the nation's most stringent — has appropriated property without compensation, in violation of the Takings Clause.

Rent controls first appeared as emergency measures during this century's two world wars. This Court upheld temporary wartime controls in *Block v. Hirsh,* 256 U.S. 135 (1921) and *Bowles v. Willingham,* 321 U.S. 503 (1944). These emergency measures generally lapsed shortly after the Second World War.

A generation later, persistent inflation inspired permanent, second-generation rent controls in many communities throughout the country. In California, Berkeley led the way with a 1972 initiative amending the city charter to (i) create an elected rent board, (ii) roll rents back to levels in effect a year earlier, (iii) restrict evictions, and (iv) prohibit rent increases, except through formal proceedings for each and every apartment. California's Supreme Court struck down the Berkeley initiative on narrow grounds, because adjustment procedures were too slow and cumbersome, and the eviction provisions conflicted with state law. *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P. 2d 1001 (1976)[2]

Tenant partisans who sponsored the Santa Monica initiative consciously modeled their charter amendment on the 1972 Berkeley initiative. The recitals — notably the stated purpose to benefit the poor, minorities and the aged — are

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[2] In 1980, Berkeley adopted a modified initiative that attempted to correct these deficiencies. Facial attacks were rejected in *Fisher v. City of Berkeley* 37 Cal. 3d 644, 209 Cal. Rptr. 682, 693 P.2d 261 (1984), *aff'd on other grounds,* 475 U.S. 260 (1986).

paraphrased from the Berkeley initiative.[3] Numerous other provisions were also copied from Berkeley's initiative, in light of the *Birkenfeld* opinion.

Santa Monica's 1979 initiative froze rents, rolled rents back to levels in effect during 1978, but thereafter allowed minimal annual increases, as well as individual increases, decided upon applications, after hearing and, if necessary, an appeal to the elected rent control board. Rents remain controlled when tenants move away or are lawfully evicted (though a recent state law now permits adjustments for new tenancies.)[4] Tenants comprise a majority of the electorate. Tenant partisans have dominated the rent board throughout its history. City-wide general rent increases have not kept

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[3] *Compare* Santa Monica Rent Control Charter Amendment §1800:

> *A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing.* In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. These conditions *endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families and senior citizens. The purpose of this Article, therefore, is to alleviate the hardship . . . .*

and Section 1 of the 1972 Berkeley charter amendment (reproduced as an appendix to the *Birkenfeld* opinion):

> *A growing shortage of housing units resulting in a critically low vacancy rate, rapidly rising and exorbitant rents exploiting this shortage,* and the continuing deterioration of the existing housing stock *constitute a serious* public emergency *affecting the lives of a substantial proportion of those Berkeley residents who reside in rental housing.* These emergency conditions *endanger the public health and welfare of the City of Berkeley* and *especially the health and welfare of the poor, minorities, students and the aged. The purpose of this Article, therefore, is to alleviate the hardship . . . .")*

(Emphasis added)

[4] Cal. Civ. Code §§1954.50-1954.53.

pace with inflation. Individual increases are generally limited to a fraction of the change in the cost of living. In real terms, adjusted for inflation, Santa Monica rents have declined progressively since 1979.

Santa Monica's charter amendment does much more than control rents. Tenants may petition for rent reductions, recover treble damages and other civil penalties. Violations are criminal offenses. Owners may not evict tenants without just cause. Rental property may not be demolished or converted to any other use without rent board approval.

Twenty years have passed since Santa Monica voters adopted rent control. Since then, the City's supply of rental housing has shrunk. Numbers of families, single parent households, low income tenants, and elderly tenants have, in fact, declined — in contrast to adjacent communities within metropolitan Los Angeles. According to Santa Monica Beach, Santa Monica's stringent rent law accounts for these perverse effects, which are contrary to the measure's stated purposes. Santa Monica Beach therefore claims that Santa Monica's rent law does not, in fact, substantially advance a legitimate purpose, as it must under *Agins, Nollan* and other precedents.

The trial court sustained the rent board's demurrer. On appeal, the California Court of Appeal reversed, agreeing that *Nollan* required "a heightened standard of scrutiny . . . and, if the allegations were true, that the Rent Control Law's failure to meet its stated purposes meant that it failed to substantially advance a legitimate government purpose, and was therefore a taking of property." *Santa Monica Beach v. Superior Court,* 81 Cal. Rptr. 2d 93 at 97 (Cal. 1999). The California Supreme Court reversed, upholding the trial court's dismissal. According to the plurality opinion, "the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply in this case." *Id.* 81 Cal. Rptr. 2d at 102. A concurring opinion endorsed the

plurality's adoption of a "rational relationship" test to determine whether legislative restrictions on property "substantially advance" legitimate purposes, but acknowledged uncertainty concerning application of *Nollan* and *Dolan* to legislation as well as permit proceedings. The concurring opinion "urge[d this Court] to resolve this uncertainty." *Id.* 81 Cal. Rptr. 2d at 112 (Kennard, J., concurring).

SUMMARY OF ARGUMENT

This Court held in *Agins* that application of a land use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests." 447 U.S. at 260. This case of first impression challenges long run application of stringent regulations of rental property under that standard.

Nollan and *Dolan* teach that the Constitution requires an "essential nexus" between exactions from property owners, and the "end advanced as the justification" for the exaction. *Nollan,* 483 U.S. 837. If "a nexus exists" there must be a "rough proportionality" between the means chosen and the desired end. *Dolan,* 512 U.S. at 391. The Court chose this formulation to avoid confusion with "the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause." *Id.* In other words, the Constitution requires more than the minimal scrutiny exercised by the California court below.

The California court reached a contrary result by limiting *Nollan* and *Dolan* to their facts: dedications of property required as conditions for permits to develop property. *Amicus* believes that *Nollan* and *Dollan* merely illustrate a larger principle: without an adequate nexus between means and ends, regulations of land use, however imposed, cannot substantially advance legitimate interests. These are issues of fact, to be proved or disproved by trial, rather than

decided upon surmise or speculation about rational bases for legislation. This Court has:

> required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved . . . not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (emphasis by the Court).

Comparison of the facts in *Nollan* and *Dolan* with the claims advanced by Santa Monica Beach confirms that the need for judicial scrutiny is, if anything, even greater when the electorate imposes heavy burdens upon a comparative handful of property owners.

- The burdens upon Santa Monica Beach — restrictions upon rent, eviction and conversion, imposing a kind of statutory leasehold or life estate — are far greater than the easements imposed in *Nollan* and *Dolan.*

- The owners in *Nollan* and *Dolan* received some compensating benefits, through permits to develop their properties, and coherent planning of the surrounding community. Santa Monica Beach receives *no* benefit from Santa Monica's charter amendment.

- Applicants for permits enjoy procedural protections, including hearings and rights of appeal. Planning authorities must base their decisions upon findings and evidence. No such protections exist when voters impose burdens upon other citizens' property through initiative legislation.

Amicus sees no constitutional or practical justification for the California court's deference to Santa Monica's initiative legislation. The same Takings Clause that protects property owners from "extortion" by planners who demand dedications must also protect owners against expropriation through the ballot box.

ARGUMENT

I.

Legislative exactions merit more than minimal scrutiny.

The constitutional system of ordered liberty depends upon a balance between majority rule and respect for the rights of the minority.

> It is of great importance in a republic . . . to guard one part of the society against the injustice of the other part. . . . Justice is the end of government. It is the end of civil society. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger . . . .[5]

The Takings Clause exists "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). Our country's founders foresaw judicial independence as a bulwark of liberty, protecting the few against occasional abuses by the many. James Madison wrote, in Federalist No. 78, that:

> [T]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance

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[5]The Federalist No. 51 (J. Madison), Wright, ed. pages 357-9 (New York 1996).

in mitigating the severity and confining the operation of such laws.[6]

These principles underlie this Court's insistence upon more than a "minimal level of scrutiny" when citizens claim that exactions from their property advance no legitimate purpose. Indeed, they apply with particular force to initiative legislation granting the bulk of the electorate substantial benefits at the expense of a few property owners. The Takings Clause, after all, is "more than a pleading requirement, and compliance with it [is] more than an exercise in cleverness or imagination." *Nollan,* 483 U.S. 841.

II.

Santa Monica's charter amendment imposes greater burdens upon property than the exactions condemned in *Nollan* and *Dolan.*

Nollan and *Dolan* involved dedication of easements, demanded by planners before they would approve permits to develop property. Mrs. Dolan wished to expand her hardware store. Local planning authorities required her to dedicate strips of property within the floodplain of an adjacent stream, and a pathway for bicycles and pedestrians. The Nollans requested permission to build a home at their seaside property. California's Coastal Commission required the Nollans to dedicate an easement along the beach, connecting two adjacent public beaches.

Neither case involved substantial cost or inconvenience to the property owner. Mrs. Dolan would have had to build a narrow pathway, and tolerate passers-by on foot or bicycle, some of whom might have patronized her business. The Nollans were asked to tolerate beachgoers — who could, in any event, have walked along the beach below the mean

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[6]The Federalist No. 78 (J. Madison), Wright, ed., pages 494-5 (New York 1996).

high tide line (boundary of the Nollans' property) without trespassing. Even minor physical invasions constitute takings of property, *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982), but neither situation imposed significant cost or inconvenience for the property owner.

Moreover, the property owners in *Nollan* and *Dolan* received significant benefits: not only approval for development, but the more general benefits that good planning may confer upon property owners generally. Sound development of coastal zones may protect the environment, enhance property values generally, and provide intangible satisfaction and benefits to visitors and residents alike. Similarly, Mrs. Dolan's hardware store might have benefitted from flood control and good traffic management, thanks to dedicated pathways and floodplains on surrounding property.

The contrasts with Santa Monica are stark.

Santa Monica Beach receives *no* benefits from the rent control charter amendment. Instead, it pays substantial registration fees, suffers strict restrictions on rent, and can neither evict residents nor demolish its building to put the property to some alternative use. In effect, its entire property has been permanently dedicated to rental operation, and the cumulative effect of strict restrictions upon rents, evictions and conversions grants tenants rights roughly equivalent to a kind of statutory leasehold or life estate. These burdens are far more severe, and far more costly, than the easements and dedications in *Nollan* and *Dolan* — and they apply to all owners of rental property, not merely applicants for permits.

Where burdens are so much more severe, the impact widespread, and the benefits to affected owners nonexistent, the need for judicial scrutiny is still greater than in *Nollan* and *Dolan*. Neither the charter amendment nor the tenant partisans consistently elected to the rent board (in a city where tenants dominate the electorate) can be expected to

provide protection from, let alone compensation for, exactions imposed through the ballot box.

III.

Santa Monica's charter amendment provides none of the procedural guarantees available in permit proceedings.

The exactions in *Nollan* and *Dolan* were imposed in permit proceedings. Oregon's land use management program and California's Coastal Act provide elaborate procedural protections, like those found in many planning laws. Applicants submit their applications to planning agencies, which hold hearings and make findings based upon evidence submitted by the applicant, professional planners and other interested parties. Decisions may be appealed, administratively or ultimately, to the courts, challenging the findings, ultimate determination, or any conditions imposed. Often (though not in *Nollan* and *Dolan*) administrative proceedings provide opportunities to reconcile competing interests through negotiation of agreed permit conditions, dedications and the like.

None of these protections exists in Santa Monica, where the burdens upon property owners were imposed by the voters in initiative legislation, from which owners have no appeal. The legislative findings contained in the recitals are not the result of formal rule-making proceedings, or legislative committee reports, after hearings and mature consideration of competing interests. Rather, Santa Monica tenants voted themselves substantial subsidies and other benefits — at the property owners' expense — on the basis of findings paraphrased from another model initiative.

In the circumstances, the need for meaningful judicial scrutiny is, if anything, greater than in permit proceedings. Otherwise, this Court's insistence upon a reasonable nexus between means and ends will — at least in California — be

reduced to a mere pleading requirement, so that substantial advancement of legitimate state purposes may be conclusively established through artful draftsmanship or erudite speculation.

CONCLUSION

Amicus recognizes rent controls and other regulations as facts of life in many communities. However, their application and operation in particular cases remains subject to the Takings Clause. If, as Santa Monica Beach alleges, Santa Monica's charter amendment imposes burdens upon property owners, while subverting its stated purpose, serious questions arise: Does Santa Monica's charter amendment, as applied, substantially advance legitimate state purposes? These questions are matters of fact, to be proved or disproved from evidence, after trial, rather than dismissed based upon judicial conjecture.

For these reasons, *amicus* respectfully requests that this Court grant the petition for *certiorari* filed by Santa Monica Beach.

Dated: April 20, 1999

Respectfully submitted,
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In the
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On Petition for Writ of Certiorari
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BRIEF OF *AMICI CURIÆ* AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP; AMERICAN SENIORS HOUSING ASSOCIATION; COMMUNITY HOUSING IMPROVEMENT PROGRAM; HUDSON COUNTY BOARD OF REALTORS; HUDSON COUNTY TAXPAYERS ASSOCIATION; ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION; MAINE CONSERVATION RIGHTS INSTITUTE; METROPOLITAN REAL ESTATE INVESTORS ASSOCIATION; NATIONAL APARTMENT ASSOCIATION; NATIONAL MULTI HOUSING COUNCIL; NEW HAMPSHIRE PROPERTY OWNERS ASSOCIATION; PROPERTY OWNING WOMEN; PROPERTY RIGHTS FOUNDATION OF AMERICA; RENT STABILIZATION ASSOCIATION; AND SMALL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should the ends-means nexus test of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), be used to determine whether a rent control law effects a regulatory taking as applied to specific real property?

2. Is a claim for an as-applied regulatory taking properly set forth by factual allegations which, if proven at trial, would show that the application of a rent control ordinance has "no relationship at all" to its admittedly legitimate police power objectives?

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No. 98 - 1512

In the
Supreme Court of the United States
October Term, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,
SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

On Petition for Writ of Certiorari
to the California Supreme Court

BRIEF OF *AMICI CURIÆ* AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP; AMERICAN SENIORS HOUSING ASSOCIATION; COMMUNITY HOUSING IMPROVEMENT PROGRAM; HUDSON COUNTY BOARD OF REALTORS; HUDSON COUNTY TAXPAYERS ASSOCIATION; ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION; MAINE CONSERVATION RIGHTS INSTITUTE; METROPOLITAN REAL ESTATE INVESTORS ASSOCIATION; NATIONAL APARTMENT ASSOCIATION; NATIONAL MULTI HOUSING COUNCIL; NEW HAMPSHIRE PROPERTY OWNERS ASSOCIATION; PROPERTY OWNING WOMEN; PROPERTY RIGHTS FOUNDATION OF AMERICA; RENT STABILIZATION ASSOCIATION; AND SMALL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIÆ*[1]

The *Amicus* organizations[2] seek to bring to the Court's

1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that neither counsel for Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief.

2 American Association for Small Property Ownership is a national grassroots organization of small property owners. American Association for Small Property Owners' goal is to restore common sense and equity to

federal, state and local regulations, and to tax and liability and other laws that unduly impinge on the right of small property owners to build wealth with real estate.

American Seniors Housing Association is an affiliate of the National Multi Housing Council that represents the interests of the nation's largest firms involved in seniors housing. American Seniors Housing Association consists of the principal officers of these firms. The members of the American Seniors Housing Association are engaged in all aspects of the development and operation of seniors housing, including ownership, construction, management, and finance.

Community Housing Improvement Program, Inc., is a not-for-profit trade association representing more than 2000 owners of rent-controlled and rent-stabilized apartment buildings in New York City. The organization was established in 1966 to inform and represent its members on issues of rent regulation and apartment management.

Hudson County Board of Realtors, Inc., is a New Jersey not-for-profit corporation which currently has 1797 members throughout Hudson County, New Jersey. The goals of the organization are, *inter alia*, to further the interest of home and other real estate property ownership and to unite those engaged in the real estate profession.

Hudson County Taxpayers Association is an organization of property owners in Hudson County, New Jersey. It has approximately 850 members who are concerned with the effect of government regulation, in particular rent control and tax policy, on property values of small property owners.

Illinois Rental Property Owners Association is an organization of rental property owners, investors, and managers in Illinois. It unites numerous member organizations from around the state, comprising approximately 2000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Maine Conservation Rights Institute is a non-profit organization committed to the application of innovative conservation methods within the context of the private property and free market systems. It has approximately 900 associates. Maine Conservation Rights Institute's mission, in part, is to educate the public as to their constitutional property rights.

Metropolitan Real Estate Investors Association is a New Jersey not-for-profit member-sponsored real estate organization incorporated in

1987. Metropolitan Real Estate Investors Association includes approximately 125 real estate investors, who are housing providers and rehabilitators of small unit rental housing in the New York metropolitan area, primarily in northern New Jersey.

National Apartment Association is the largest national federation of state and local associations of apartment industry professionals including developers, owners, investors, and property managers. National Apartment Association is comprised of 150 affiliates and represents more than 26,000 professionals who own and/or manage more than 3.3 million apartments.

National Multi Housing Council is a non-profit association representing some of the apartment industry's largest firms. National Multi Housing Council consists of over 800 members, who are the principal officers of these firms. The members of the National Multi Housing Council are engaged in all aspects of the development and operation of multi-family housing, including ownership, construction, management, and finance.

New Hampshire Property Owners Association is an all-volunteer New Hampshire trade association for owners and managers of rental real estate. New Hampshire Property Owners Association has seven city chapters and over 700 member landlords. Its mission, in part, is to educate small property owners about management skills and applicable laws.

Property Owning Women is a non-profit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health, and quality of life.

Property Rights Foundation of America is a tax-exempt incorporated association with 1500 members. It represents private property owners nationally. Among its objectives is to promote the fundamental constitutional right to own and use private property.

Rent Stabilization Association is a New York not-for-profit corporation. The Rent Stabilization Association is a trade association with a membership of approximately 25,000 owners and managers of rent-regulated residential real property in New York City. The mission of the Rent Stabilization Association includes advocating for the property interests of its membership.

Small Property Owners Association is a nonprofit organization which began in Cambridge, Massachusetts, 1987, and includes 3,000 members throughout Massachusetts. The Small Property Owners

attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

If the decision below is not reversed, property owners will not be able to use scientific evidence or factual data to challenge regulatory takings. If the decision below is allowed to stand, different standards of review of regulatory takings under the Fifth Amendment to the United States Constitution will apply in various states and the federal courts. Rent control is a substantial regulation of property that has substantial popular political appeal. Under the decision below, property owners will be left without recourse to preserve the investment value of their property and challenge the expansion of rent control if they are prohibited from presenting data that demonstrate the lack of nexus between a regulation's intent and its result. These issues are of significance to the members of the *Amicus* organizations as well as to property owners generally. *Amici Curiæ* believe that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of certiorari.

Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Santa Monica Beach, Ltd.

Association's goal is to preserve the 1994 Massachusetts referendum repeal of rent control, advance the rights and interests of small, family-business rental owners, and educate the public on the contribution of small property ownership to neighborhood stability and affordable housing.

SUMMARY OF ARGUMENT

The California Supreme Court erroneously concluded that it could ignore demographic data demonstrating that the Santa Monica Rent Control Law did not advance its stated purpose. This Court should grant the petition for certiorari because the decision below interpreting the applicable standard for regulatory takings as enunciated in *Nollan v. California Coastal Commission,* 483 U.S. 825, 834 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374, 386 (1994), deprives those standards of meaning and conflicts with the decisions of other state and federal courts. The decision below also directly repudiates a decision of this Court, *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924). Moreover, the issue before this Court is not unique. The long-term adverse consequences of rent control—the decrease in affordable housing in affected jurisdictions and continuing housing shortages—predicted by standard economic theory have been borne out by studies of other jurisdictions. Under the *Nollan* standard, property owners should be able to demonstrate through demographic data that rent control, rather than advancing its stated intent, in fact hinders it.

ARGUMENT

I. THE DECISION OF THE CALIFORNIA SUPREME COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS AND WITH OPINIONS OF THIS COURT BY REFUSING TO CONSIDER EVIDENCE OF THE EFFECT OF RENT CONTROL ON ACHIEVING THE CITY'S STATED GOALS AND CONTINUING THEIR EFFECT BEYOND ANY INITIAL EMERGENCY.

Amici contend that property owner Santa Monica Beach, Ltd. ("SMB") should be permitted to demonstrate at trial that the Santa Monica Rent Control Law, SANTA MONICA, CAL.

CHARTER Article XVIII, Section 1800, violates the Takings Clause of the Fifth Amendment to the United States Constitution (as applicable through the Due Process Clause of the Fourteenth Amendment). The Santa Monica Rent Control Board ("the Board") in its demurrer to SMB's complaint has made no proffer that there is a current rent emergency unrelated to the imposition of rent control or that rent control in fact advances any substantial state interest.

Pursuant to Supreme Court Rule 10 (b), certiorari is appropriate in this case as the decision of the California Supreme Court below conflicts with those of another state court of last resort and of a United States Court of Appeals. This Court, in *Yee v. City of Escondido,* 503 U.S. 519, 537–38 (1992), declined to address the issue of rent control as a regulatory taking, in part because at that time there was no conflict among lower courts on the issue. At this time, however, there are conflicting rulings on whether a general rent control scheme that fails to advance its stated goals constitutes a regulatory taking under the standards of *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 (1987) ("*Nollan*"), and *Dolan v. City of Tigard,* 512 U.S. 374, 386 (1994) ("*Dolan*").

As suggested in *Yee, supra,* 483 U.S. at 538, certiorari is now appropriate as there is a conflict in this case "between two courts whose jurisdiction includes California, the State with the largest population and one with a relatively high percentage of the Nation's [rent-controlled residential properties]. Forum shopping is thus of particular concern." *Id.* at 538. In this case, the decision of the California Supreme Court below, *Santa Monica Beach, Ltd. v. Superior Court,* 968 P.2d 993, 81 Cal. Rptr. 93 (1999), by interpreting the *Nollan* and *Dolan* standards as a "rational relation test," App. A-14–16, A-21–22, directly conflicts with the opinion of the Court of Appeals for the Ninth Circuit in *Richardson v. City of Honolulu,* 124 F.3d 1150,

1165–66 (9th Cir. 1997). The Court of Appeals in *Richardson* held an ordinance that "regulate[d] the use of the lessors' property in a manner that d[id] not substantially further the goal of creating affordable housing," *id.*, constitutes a regulatory taking.

The decision below also conflicts with the opinion of the New York State Court of Appeals, the highest court of another large state with a large percentage of the Nation's rent-controlled housing, in *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 392–93, 643 N.E.2d 479, 482–83, 618 N.Y.S.2d 857, 860–61 (1994), *cert. denied*, 514 U.S. 1109 (1995). In *Manocherian*, the Court of Appeals, applying the *Nollan* and *Dolan* substantial advancement standard, found a provision of the New York City Rent Stabilization Law ("RSL") to be a regulatory taking because the provision "contradict[ed] two key goals of the RSL, to wit, occupant protection and eventual market redemption." *Id.* at 84 N.Y.2d at 394, 643 N.E.2d at 483, 618 N.Y.S.2d at 861. Thus, in that case, the Court of Appeals analyzed the provision to determine whether it actually advanced the state's enunciated goals, as required under *Nollan* and *Dolan*, while the majority in the decision below was satisfied with the enunciation of lofty goals and declined to address the practical effects of the legislation. App. A-15–18.

Another reason that this Court, in *Yee, supra*, 503 U.S. at 538, declined to consider whether rent control effects a regulatory taking was that the issue had not been fully litigated below, depriving the Court of the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. In this case, however, the Court has the benefit of three lower court determinations directly on point, as well as three thoughtful dissenting opinions and a concurrence in the decision of the state court of last resort.

In addition, certiorari is warranted pursuant to Supreme Court Rule 10 (c) as the decision below conflicts with relevant decisions of this Court in *Nollan, Dolan,* and *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924). While the opinion below purports to follow *Nollan* and *Dolan,* App. A-19–22 (while thoroughly distorting their meaning, as discussed in the dissenting opinions of Justices Baxter, Chin, and Brown), the majority below explicitly repudiates *Chastleton Corp. v. Sinclair,* 264 U.S. 543 (1924). App. A-23.[3] Justice Baxter's dissent ably discusses the continuing validity of *Chastleton,* App. A-71–72. In dismissing *Chastleton* as "a *Lochner*-era case the validity of which is questionable at best," App. A-23, the majority below ignores the fact that *Chastleton* was clearly decided on Fifth Amendment Takings Clause grounds, not as a substantive due process claim. *Chastleton, supra,* 264 U.S. at 546.

In *Chastleton,* which concerned the continuation of rent control initially imposed during the First World War, this Court stated that "the emergency that justified interference with ordinarily existing private rights [during the First World War and its immediate aftermath] had come to an end in 1922, and no longer could be applied consistently with the Fifth Amendment of the Constitution." *Id.* at 546. The Court went on to hold that, if all that remained of the wartime emergency was inflated prices, "that is not, in itself, a justification of the [rent control] act." *Id.* at 548.

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3 Several state courts have previously held that the emergency requirement for adoption of rent control is no longer applicable. *Birkenfeld v. City of Berkeley,* 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 129 (Cal. 1976); *Westchester W. No. 2 Ptsp. v. Montgomery County,* 348 A.2d 856 (Md. 1975); *Hutton Park Gardens v. Town Council of W. Orange,* 68 N.J. 543, 350 A.2d 1 (1975). All of these cases were decided before *Nollan* and *Dolan.*

Since *Chastleton*, this Court has not subsequently addressed the doctrine of emergency as justification for rent control outside of the context of a war and its immediate aftermath.[4] Nevertheless, *Chastleton* contains clear, definitive language invalidating rent control legislation that continues beyond the emergency that supported its enactment. *Chastleton* was authored by Justice Holmes, the same justice who had two years earlier written *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the foundation of modern regulatory takings jurisprudence.[5] *Chastleton* thus clearly presages and falls within the standards enunciated in *Nollan* and *Dolan*, because ameliorating temporary high inflation in housing prices caused by war-time disruptions is a legitimate public interest which may, in certain circumstances, be advanced, in the short-term only, by rent control. *See* Richard Arnott, *Rent Control, in* 3

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4 *See Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945). *See also Woods, supra*, 333 U.S. at 146–47 (Jackson, J., concurring) ("Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect the conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care. . . . I cannot accept the argument that war powers last as long as the effects and consequences of war for if so they are permanent . . . .").

5 It should be noted, moreover, that Justice Holmes had presciently dissented in *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting). Moreover, this Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938)—the case considered by commentators to mark the demise of *Lochner*, *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7 at 582 (2d ed. 1988)—relied upon *Chastleton* for the proposition that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Carolene Prods. Co., supra*, 304 U.S. at 153.

NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 305, 307 (Peter Newman ed., 1998). *Chastleton* was relied upon by this Court as recently as *Baker v. Carr*, 369 U.S. 186, 214 (1962) (per Brennan, J.), quoting *Chastleton* for the proposition that "political" questions are justiciable.[6]

Assuming that the emergency basis for the Santa Monica Rent Control Law was a marked inflation in rents, the temporary effect of inflation in the late 1970s should have dissipated by now.[7] If, at this point, all that is left is the lingering effects on the base rent of the initial rise in prices, then the emergency has passed in accordance with *Chastleton, supra*, 264 U.S. at 547–48 ("A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."). Moreover, to the extent that rent control may reduce rents in Santa Monica below market rent for comparable facilities in neighboring towns, that lower rent will result in increased demand for housing in Santa Monica and gradual deterioration and diminution of the Santa Monica rental housing stock, exacerbating rather than relieving the problem,

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6 "'[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended.'" *Baker, supra*, 369 U.S. at 214 (quoting *Chastleton, supra*, 264 U.S. 547–48).

7 It should be noted that the rental emergency caused by the First World War was determined to be over within four years of the signing of the armistice on November 11, 1918. *Chastleton, supra*, 264 U.S. at 546.

as discussed below.[8] If a situation that caused a regulation to be passed continues in effect because of the regulation itself, it ceases to be an "emergency," therefore, invalidating further application of the regulation. *See Chastleton, supra,* 264 U.S. at 546; R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?* 21 SW. U. L. REV. 1019, 1032 (1992) ("Courts must employ heightened scrutiny to determine that a specific ordinance, as administered, substantially contributes to relieving the problems stemming from the emergency.").

In this case, the Santa Monica Rent Control Law includes in its preamble a *pro forma* recitation that "A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitutes a serious housing problem . . . ."[9] Yet the Board has not proffered any

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8 *See* ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 32 (2d ed. 1997); N. GREGORY MANKIEW, *PRINCIPLES OF ECONOMICS* 115–17 (1998); JOSEPH E. STIGLITZ, *ECONOMICS* 114–16 (2d ed. 1993); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation,* 54 BROOK. L. REV. 741, 763, 765–67 (1988) (rent control linked to decrease in quality and quantity of rental housing); Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol,* 35 U.C.L.A. L. REV. 399, 432–33, 434, 440 (1988); R.S. Radford, *Why Rent Control is a Regulatory Taking?* 6 FORDHAM ENVTL. L.J. 755, 769–70 (1995); R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?* 21 SW. U. L. REV. 1019, 1034–35, 1039–40 (1992).

9 Many rent control ordinances contain a relatively general declaration of emergency, most often referring to a perceived shortage of rental housing. Radford, *supra,* 21 SW. U. L. REV. at 1033 & nn. 94–96. This rote recitation of an "emergency" basis is not adequate to overcome a takings claim. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1026 (1992) ("A fortiori the legislature's recitation of a . . . justification cannot be the basis for departure from our categorical rule that

defenses that would rebut SMB's allegations or indicate that the Santa Monica rent control program in any way alleviates a shortage of rental housing units as required under *Nollan* and *Dolan.* Certainly, the Board cannot satisfy *Chastleton*'s requirement that any rental housing emergency declared in 1979 continue to this date for a non-self-perpetuating reason. The decision of the California Supreme Court below explicitly contradicts the continuing mandate of this Court in *Chastleton* and therefore merits review and correction.

II. THE EXPERIENCE OF OTHER RENT-CONTROLLED JURISDICTIONS IS SIMILAR TO THAT OF SANTA MONICA AND DEMONSTRATES THAT RENT CONTROL REDUCES THE NUMBER OF RENTAL UNITS AND OF POOR, MINORITY, AND STUDENT TENANTS.

The experience of Santa Monica is by no means unique. At least five states and the District of Columbia currently permit local rent control.[10] Given the seductive lure of reducing housing costs without direct and transparent costs to the

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total regulatory takings must be compensated. If it were, departure would virtually always be allowed. ").

10 California, Maine, Maryland, New Jersey, New York, and the District of Columbia. *See* Edgar O. Olsen, *Is Rent Control Good Social Policy?* 67 CHI.-KENT L. REV. 931, 931 (1991). In 1994, after a successful referendum, Massachusetts eliminated rent control. *See* MASS. G.L. ch. 40P; 1994 Mass. Stat. ch. 282. *But see infra* note 11. In 1995, Maine deleted its rent control enabling statute, but permitted existing municipal rent control ordinances to continue and enunciated a legislative intent "to permit municipalities to continue to adopt and enforce rent control ordinances under home rule authority." 1995 Me. Laws ch. 194. The City of Westbrook, Maine, continues to operate a rent control ordinance, WESTBROOK, ME., CODE §§ 21-15 *et seq.*, which is currently the subject of litigation. *Ham Westbrook, L.L.C. v. Inhabitants of Westbrook,* Dock. No. AP-98-111 (Cumberland, Me., Super. Ct.).

government, municipalities will continue to have incentives to impose rent control even without state authorization. *See, e.g., Bannerman v. City of Fall River,* 391 Mass. 328, 330–31, 461 N.E.2d 793 (1984); *Girard v. Town of Allenstown,* 121 N.H. 268, 272, 428 A.2d 488, 491 (1981). The long-term adverse effects of rent control are not readily apparent to the general public. Once in place, rent control is difficult to end because its imposition creates a large and strong constituency supporting its continuation.[11] Yet, as discussed more fully below, consistent with standard economic theory, rent control has resulted in a decline in the number of rental housing units and of poor, minority, and student tenants in other rent-controlled jurisdictions.

The fact that the adverse effects of rent control in Santa Monica have been repeated in other jurisdictions in other states supports granting certiorari in this case as this Court's determination will affect several large and economically vital jurisdictions that currently enforce rent control or are considering its imposition in the future. The extent to which rent control constitutes a regulatory taking is thus a matter of national concern that this Court has not previously considered[12]

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11 Particularly in times of high housing price inflation (regardless of general price stability), there is a strong popular demand for rent control. For example, in Massachusetts rent control was repealed by statute, Mass. G.L. ch. 40P, after a successful 1994 referendum campaign. Nevertheless, currently there is an effort to reimpose rent control through legislation would affect all properties that once benefitted from government housing subsidies and would gradually spread rent control, since the bill covers all apartments ever occupied by a Section 8 tenant. 1999 Mass. House Bill 1548 §§ 2 (A) (3), 5.

12 In *Yee, supra,* 483 U.S. at 537–38, this Court recognized the importance of and invited consideration of the regulatory taking question in an appropriate case.

and that should be addressed by this Court pursuant to Supreme Court Rule 10 (c).

Classic economic theory teaches that the effects of "hard" or "first-generation" rent control[13] include the following effects: an increase in tenant demand for cheap apartments, a reduction of supply of apartments, deterioration of rental housing stock, discouragement of new rental construction, inefficient distribution of rental housing resources,[14] side-payments, and selection by landlords of "easy" tenants. *See* N. GREGORY MANKIEW, *PRINCIPLES OF ECONOMICS* 115–17 (1998); JOSEPH E. STIGLITZ, *ECONOMICS* 114–16 (2d ed. 1993); Arnott, *supra,* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 306. As landlords under rent control must rent at the regulated rent, they can exercise their prejudices in tenant selection without paying an economic penalty, as they would in the free market. Therefore, for example, a landlord who would prefer to rent available apartments to quiet widows rather than to noisy students would not be forced to lower his rents to accommodate his selective tenant choices. *See id.*

So called second-generation rent controls, which "entail a complex set of optional provisions governing not only rents and rent-increases, but also conversion, maintenance, and landlord-tenant relations," were introduced in the 1970s.

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13 "'[F]irst-Generation' [rent control] programmes [sic] entail rent freezes, with intermittent upward adjustments in rents." Arnott, *supra,* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 305.

14 "The proverbial example [of inefficient distribution of housing resources under rent control] is a poor widow who chooses to remain in the large unit in which she raised her children, while large young families have to settle for cramped quarters." Arnott, *supra,* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 306.

Arnott, *supra*, 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 305–306. The extent to which second-generation rent control mitigates the perverse effects of classic first-generation rent control depends on the particular provisions of the implementing regulations, *id.* at 307, and can best be reviewed by empiric analysis such as that proffered by SMB below.

It is not surprising that investors refrain from development of residential real estate in areas subject to rent control. Residential housing has historically had one of the lowest returns on investment of traditional investment vehicles, *Slimmer Pickings*, ECONOMIST, Mar. 23, 1996, at 78, even without the additional disincentive of rent control. Even with a second-generation style regulation exempting new construction from rent control, the existence of rent control considerably increases potential investors' fears that Santa Monica might decide at a future date to impose rent control on additional properties when their tenants became sufficiently politically active to demand the protections available to their neighbors.[15]

Thus, as predicted by the classic economic model, in Santa Monica rental housing stock decreased by nearly 5% in

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15 *See* Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 949 (1991) (threat of rent control hampered construction of new housing in New York); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 767 (1988) ("Even if new construction is exempt from the [rent control] statute, existing rent control laws give a loud and clear signal that old policies may be reversed so that future units may be subject to similar restrictions." (footnotes omitted)); Edgar O. Olsen, *Is Rent Control Good Social Policy?* 67 CHI.-KENT L. REV. 931, 943 (1991); R.S. Radford, *supra*, 21 SW. U. L. REV. at 1037–38 & n. 130 (New York City has twice implemented rent controls for previously exempt buildings).

the ten years from 1980 to 1990 while rental housing increased in comparable Southern California towns without rent control, App. E-3. It would appear that in Santa Monica landlords withdrew properties from the rental market by owner-occupancy or deterioration and replacement housing was not built. By increasing demand, *see* Radford, *supra,* 21 SW. L. REV. at 1039–40 & n. 136, and decreasing supply, *see supra,* note 15, rent control thus effectively creates the perception of a continuing emergency, which can only be alleviated by incentives to increase supply and to dampen demand, such as introduction of free market rents.

Similar trends were demonstrated from 1980 to 1990 in rent-controlled Cambridge and Brookline, Massachusetts. ROLF GOETZE, *RENT CONTROL: AFFORDABLE HOUSING FOR THE PRIVILEGED, NOT THE POOR* 8–11 (1994). Cambridge and Brookline rental housing stock decreased from 1980 to 1990, while rental housing stock in the ten largest non-rent-controlled Greater Boston towns increased. *Id.* ii, 7–8, 2-9 (1994).[16] Studies of New York City and other rent-controlled municipalities similarly indicate that rent control leads to deterioration of rent-controlled apartments and reduction of rental housing stock. MANKIEW, *supra,* at 115–17; STIGLITZ,

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16 After rent control ended in Cambridge in 1995, landlords began reinvesting in residential property maintenance. A recent study commissioned by the City of Cambridge found that new tenants of formerly rent-controlled ("decontrolled") apartments assessed their housing conditions considerably more favorably than did tenants remaining in decontrolled apartments. ATLANTIC MARKETING RESEARCH, *CAMBRIDGE RENTAL HOUSING STUDY: IMPACTS OF THE TERMINATION OF RENT CONTROL* 52 (1998). In the years immediately following the termination of rent control, permits for building improvements to decontrolled properties jumped by 68%, indicating significant deferred maintenance on such units. *Id.* at 79.

supra, at 114–16; Arnott, *supra*, at 309; Radford, *supra*, 21 Sw. U. L. REV. at 1034–36 & nn. 104–11.

The demographic data presented by SMB indicate that rent control has had the predicted classical effect on disadvantaged social groups in Santa Monica. App. E-3–4. *See* MANKIEW, *supra*, at 117; Arnott, *supra*, 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW at 306. The number of poor, students, and minorities decreased because under rent control there was no adverse economic impact to landlords in renting to members of other groups perceived to be "easier" tenants. App. E-3–4. *See* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 769 & n. 118 (1988); R.S. Radford, *Why Rent Control is a Regulatory Taking?* 6 FORDHAM ENVTL. L.J. 755, 769–70 (1995); Radford, *supra*, 21 SW. U.L. REV. at 1047–48 & nn. 181–85. The poor and the elderly are particularly susceptible to the high search costs caused by excess demand for cheap rent-controlled apartments and inadequate incentives to increase supply. The poor cannot afford side payments and move more frequently, so that it is harder for them to maintain a position on a waitlist. Radford, *supra*, 21 SW. U.L. REV. at 1047 & nn. 178–80. The elderly may be daunted by the time and legwork necessary to locate an appropriate rent-controlled apartment. As older rent-controlled apartment dwellers gradually move out, they tend to be replaced by younger, more aggressive apartment seekers.

Demographic data taken from the United States Census for Cambridge and Brookline, Massachusetts, demonstrate trends similar to those apparent in Santa Monica. Based on 1990 Census data, there was considerable housing underutilization in rent-controlled Cambridge and Brookline, indicating that rent-controlled tenants chose to live alone or in smaller family units or to rent more space than they would have

in neighboring non-controlled towns. GOETZE, *supra*, at 8–9, 15–16. Families with children in Cambridge were significantly more likely to live in market-rate apartments than rent-controlled units. *Id.* Cambridge Election Commission data on occupation and birthdate and Census data indicate that individuals in their 20s, 30s, and 40s were more likely to live in rent-controlled apartments than those over 60, who were more likely to live in market-rate or publicly assisted units. *Id.* at 18–19, 2-14–15. Contrary to the intent of many rent control laws (including Santa Monica's), white collar employees and those in the skilled trades predominated in Cambridge rent-controlled housing while unskilled workers, students, housewives, and retirees were as likely or more likely to live in uncontrolled buildings. *Id.* at 16–17, 2-16–17. In 1990, rent-controlled tenants in Cambridge had yearly incomes averaging over $1000 higher than tenants in Cambridge market-rate apartments. *Id.* at 14–15.[17] Similarly, in 1990, fewer than 14% of tenants in rent-controlled housing were non-white, while 19% of tenants in market-rate apartments were non-white. *Id.* at 19. These findings—fewer elderly, minorities, and families in rent-controlled housing than in market-rate housing—parallel the predicted effects of rent control as a powerful force for gentrification in Santa Monica.

Not unsurprisingly, in a study commissioned by the City of Cambridge based on a 1997 survey of 1000 households, the

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17 Similarly, in New York City, a 1986 study for the Rent Stabilization Association indicated that wealthy white families received the greatest economic benefit from rent regulation while poor blacks and Hispanics (a large percentage of the total New York City population) received considerably less direct benefit from rent regulation. ARTHUR D. LITTLE, INC., *A TALE OF TWO CITIES* ES-4–5 (1986). *See* Richard Ault & Richard Saba, *The Economic Effects of Long-term Rent Control: The Case of New York City*, 3 J. REAL EST. FIN. & ECON. 25 (1990).

numbers of poor, minorities, and students increased in Cambridge *after* rent control was terminated in Massachusetts. ATLANTIC MARKETING RESEARCH, *CAMBRIDGE RENTAL HOUSING STUDY: IMPACTS OF THE TERMINATION OF RENT CONTROL* 34, 43–44 (1998). Despite the end of rent control, the socioeconomic profile of Cambridge became poorer. Significantly more wealthy households moved out after rent control was ended while moderate income and poor tenants replaced them in their decontrolled apartments. *Id.* For example, households with under $20,000 in yearly income increased by 5% while households with income over $80,000 decreased by 13% based on move-in/move-out data. *Id.*[18] This is consistent with the wealthy—who were receiving sizable subsidies under rent control—moving out to more appropriate owned housing or larger apartments after their subsidized controlled rents terminated and being replaced by lower income individuals willing to pay a reasonable rent for the now more readily available apartments.

SMB sought to present empirical evidence that demonstrates that the Santa Monica Rent Control Law in fact has the adverse effects predicted by economic theory (and these effects are confirmed by comparison with similar communities). A property owner should not be precluded from using that evidence to convince a court that the regulation's unintended effects outweigh or, as in this case, negate the intended benefits of the regulation under the standards articulated by this Court in *Nollan* and *Dolan*. "'[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law

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18 In addition, the Cambridge Survey indicated that, based on move-in/move-out data, the number of non-white tenants increased by 12% and the number of students increased by 18% after rent control was terminated. *Id.* at 43–44.

depends upon the truth of what is declared.'" *Baker, supra,* 369 U.S. at 214 (quoting *Chastleton, supra,* 264 U.S. 547–48).

CONCLUSION

For the reasons stated above, Santa Monica Beach, Ltd.'s petition for a writ of certiorari should be granted.

Respectfully submitted,

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COMMUNITY HOUSING IMPROVEMENT PROGRAM;
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MAINE CONSERVATION RIGHTS INSTITUTE;
METROPOLITAN REAL ESTATE INVESTORS ASSOCIATION;
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No. 98-1512

In The

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

SANTA MONICA RENT CONTROL BOARD,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The California Supreme Court

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Institute for Justice is a non-profit, public interest legal center committed to defending and strengthening the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The instant case involves the standard to be applied to a broad range of regulatory takings cases throughout the country.

The issues presented in this case go to fundamental questions about the nature and exercise of governmental power in a highly regulated, modern state and the rights of individuals faced with such enormous power. The Institute's brief addresses the confusion and conflicts among federal and state courts on how to evaluate regulatory takings claims.

The Institute for Justice has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk.[1]

STATEMENT OF THE CASE

The facts of the case have been well stated in the petitioner's brief petitioning for certiorari (Petition for Writ of Certiorari at 2-13) and are summarized here only insofar as is necessary to illuminate the critical legal

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

issues. Petitioner Santa Monica Beach, Ltd., owns a 12-unit apartment building in the City of Santa Monica that is subject to rent controls. The City of Santa Monica instituted rent control in 1979 with the stated purpose of increasing the supply of housing for the poor, minorities, students, young families, and senior citizens. Petitioner admits that these are legitimate government interests.

When the City of Santa Monica refused petitioner's requests for rent increases, petitioner sued, arguing that the rent regulations effected a regulatory taking. Petitioner offered to prove that, far from achieving their stated purposes, the rent regulations have had the opposite effect from these supposed purposes.

The California Superior Court held that rent regulations were subject only to rational basis review and that the regulations were rational. The California Court of Appeals reversed, holding that all regulatory takings are reviewed under the *Nollan* substantial advancement test and that petitioner had stated a cause of action under this test. The California Supreme Court again reversed. It limited the application of the *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) test and held that rent regulations receive only the equivalent of rational basis review.

SUMMARY OF ARGUMENT

The California Supreme Court held that the heightened scrutiny standard of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) [hereinafter *Nollan*] and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) [hereinafter *Dolan*]

does not apply to a generally applicable rent control law. Instead, it held that such laws are subject to what amounts to rational basis review.[2] The court explained that "the 'substantially advance' standard in the takings context is applied differently depending on the type of government action under consideration." In effect, individualized or adjudicative decisions must substantially advance a legitimate governmental interest, but generally applicable or legislative rules that infringe on property rights receive only the most minimal scrutiny. *See Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1001 (Cal. 1999).

Petitioner for certiorari point out that this holding conflicts with rulings of the United States Court of Appeals for the Ninth Circuit and the New York Court of Appeals. But the California Court's misreading of *Nollan* and the multiplicity of opinions in this case are symptomatic of widespread confusion among state and federal courts about how to apply the substantial advancement test to a variety of property restrictions. This case provides a clean, clear fact situation to address these important issues that go to the core of the relationship between individuals and the state.

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[2] Citing *Dolan*, the court held that "the party challenging rent control must show 'that it constitutes an arbitrary regulation of property rights'." *Santa Monica Beach, supra*, 968 P.2d at 1002. This standard is identical to rational basis review, under which courts almost always defer to the legislature. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976) ("[I]n the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand constitutionally with the Fourteenth Amendment").

In addition, the California Supreme Court's decision leaves most California residents without a forum to vindicate their federal constitutional rights as articulated in *Nollan*. The Ninth Circuit has previously foreclosed most challenges to state violations of property rights in federal court. And now, although property owners may bring claims for just compensation, they may no longer bring a claim that property regulation does not substantially advance a legitimate governmental purpose in California state courts either.

For these reasons, *amicus curiae* Institute for Justice respectfully suggests that this court grant certiorari and clarify the proper standard of review for regulatory takings in the United States.

ARGUMENT

I. THERE IS WIDESPREAD CONFUSION AMONG STATE AND FEDERAL COURTS ABOUT HOW TO APPLY *NOLLAN'S* SUBSTANTIAL ADVANCEMENT STANDARD TO PROPERTY REGULATION.

Four years ago, Justices Thomas and O'Connor noted that "[t]he lower courts are in conflict over whether Tigard's test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature." *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

The instant case also presents the question of whether property regulations receive a different type of review than individual decisions about property made by

governmental entities. The various state and federal opinions are riddled with different standards of judicial review. Some adopt rational basis; some treat substantial advancement as a slightly higher standard than rational basis in some situations with a heightened review in certain other situations. Some courts distinguish between adjudicatory and legislative decisions; others distinguish between exactions and use limitations. There is no consistent standard in the lower courts.

If a regulation that limits the exercise of property rights is permissible even when it has the opposite effect of the purported purpose, then that judicial review represents the very lowest form of scrutiny possible. As pled by petitioners, the rent control law does not advance its purpose at all; it retards it. While it is perhaps possible that "the State could rationally have decided that the measure adopted might achieve the State's objective," this Court explicitly rejected the notion that such a calculation fulfills the substantial advancement test. *See Nollan*, 483 U.S. 825, at 836 n.3.

Pennell v. City of San Jose, 485 U.S. 1 (1988) and *Yee v. City of Escondido*, 503 U.S. 519 (1992) are the other major takings cases, besides *Dolan*, decided by this Court after *Nollan*. Neither resolved the issues arising in this case, however. Both were facial challenges, and this Court rejected the *Pennell* challenge on the grounds that the ordinance in question would have to be challenged as applied. *Yee* involved a challenge to an ordinance as a physical taking, and the Court ruled that there was no physical taking but suggested that there might be a regulatory taking. The Court noted that certain features of the law might "have some bearing on whether the ordinance

causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee*, 503 U.S. at 530. There was no opportunity in either *Pennell* or *Yee* to apply the substantial advancement standard, although *Yee* certainly implies that it would apply to a rent control ordinance and that a nexus between means and effect would be required.

Many cases acknowledge that the substantial advancement standard should be applied to legislation that takes property by regulation. *See, e.g., Chang v. United States*, 859 F.2d 893, 896 (Fed. Cir. 1988) (applying *Nollan* standard to regulatory taking under the Libyan Sanction Regulations); *Outdoor Systems, Inc. v. City of Tucson*, 997 F.2d 604, 615-16 (9th Cir. 1993) (applying *Nollan* standard to zoning regulations); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (Ill. 1995) (applying *Nollan* and *Dolan* to legislation imposing impact fees on new development).

There remains, however, considerable confusion about when a regulation substantially advances its purpose and what constitutes a sufficient nexus between ends and means. *See Nollan*, 438 U.S. at 837. Some cases appear to give serious consideration to the nexus between the regulation's purpose and effects. *See, e.g., Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) (portion of opinion not joined by other judges) (explaining that regulation substantially advances purpose of deer herd maintenance by directly preserving habitat and being based on "sound" game management theory), *cert. denied*, 507 U.S. 987 (1993); *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) (finding

insufficient nexus between declared purpose of statute and effects), *cert. denied*, 493 U.S. 976 (1989); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994) (same), *cert. denied*, 514 U.S. 1109 (1995). The state of Washington applies heightened scrutiny analysis to all regulatory takings claims and looks carefully at the relationship between the purpose of the ordinance or governmental action and the means used to achieve it. *See, e.g., Henderson Homes, Inc. v. City of Bothell*, 877 P.2d 176, 177 (Wash. 1994) (refusing to allow statutory fees where no empirical data connected fees to impacts of development); *Trimen Development Co. v. King County*, 877 P.2d 187, 193-94 (Wash. 1994) (finding that statutory fee was proportional and directly related to the impact of the proposed development).

On the other hand, several jurisdictions ask whether general legislation substantially advances a legitimate governmental purpose but treat this question identically to due process rational basis review. *See, e.g., Texas Manufactured Housing Association, Inc. v. City of Nederland*, 101 F.3d 1095, 1104-05 (5th Cir. 1996) (rejecting heightened scrutiny in asking whether law prohibiting manufactured housing effected a regulatory taking), *cert. denied*, 521 U.S. 1112 (1997); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-79 (10th Cir. 1995) (holding that *Nollan's* essential nexus requirement applies only to development exactions where there is a physical taking); *Department of Natural Resources v. Indiana Coal Council*, 542 N.E.2d 1000, 1003-1006 (Ind. 1989) (noting that *Nollan* "did not adopt any particular level of scrutiny to be applied across the board to all takings inquiries . . . ." *Id.* at 1005-06), *cert. denied*, 493 U.S. 1078 (1998); *Arcadia Dev. Corp. v. City of*

Bloomington, 552 N.W.2d 281 (Minn. Ct. App. 1996) (holding that wealth redistribution is a legitimate governmental purpose and thus ordinance which redistributes wealth substantially advances that purpose), *rev. denied*, 1996 Min. Lexis 795 (Minn., Oct. 29, 1996).

A few states limit *Nollan's* heightened scrutiny to exactions of a possessory interest in property. Illinois and Oregon reject the distinction between adjudicative and legislative determinations, but instead apply heightened scrutiny to governmental actions that do more than limit the use of property. *See, e.g., Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct. App. 1994) (interpreting *Dolan* standard); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390-91 (Ill. Ct. App. 1995) (adopting Thomas dissent in *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995)), *app. denied*, 667 N.E.2d 1055 (1996), *cert. denied*, 519 U.S. 976 (1996); *see also Chicago Title Ins. Co. v. Village of Bolingbrook*, 1999 U.S. Dist. Lexis 1347, at * 23-39 (N.D. Ill. 1999) (applying *Dolan* to development fees).

One commentator has described the law of judicial review of property cases as characterized by "significant disarray, if not anarchy." *See* Robert Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, An Analytic Framework, and a Synthesis*, 51 Wash. U.J. Urb. and Contemp. L. 1, 6 (1997). This confusion desperately requires clarification by this Court.

II. MOST CALIFORNIA RESIDENTS HAVE NO FORUM TO VINDICATE THEIR FEDERAL CONSTITUTIONAL RIGHTS.

The California Supreme Court's ruling in this case has greater impact than the typical state supreme court ruling on a federal constitutional issue, because in California it is already extremely difficult to bring these claims in federal court. As a result of several Ninth Circuit decisions, federal court review of property regulation is barely available in California. Thus, the California Supreme Court's interpretation of federal law is for all intents and purposes dispositive of rights asserted by property owners in California.

As pointed out by petitioners, when federal review is available, the Ninth Circuit recognizes the validity of claims that a regulation does not substantially advance a legitimate governmental interest and treats that analysis as different from rational basis review. *See Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 168 (1998); Petition for Writ of Certiorari at 24-25. Thus, a few property owners will succeed in navigating through the Ninth Circuit's procedural barriers. Those California residents will have a distinctly different standard of review than the majority of residents, who will be foreclosed from raising their constitutional claims in either federal or California courts.

The holdings in the Ninth Circuit profoundly discourage pursuing most federal takings claims in federal court. One Ninth Circuit decision holds that property owners may not seek injunctive relief against a property

regulation that does not substantially advance governmental interests. *See Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285-86 (9th Cir. 1997) (holding that in order to bring a claim in federal court that a regulation does not substantially advance a legitimate government, the property owner must first seek just compensation). Another Ninth Circuit opinion permits such challenges without first applying for compensation, but nevertheless abstained from hearing the challenge and deferred to the state courts. *See San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998); *see also Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 118 S.Ct. 1386 (1998).[3] And finally, even if property owners reserve their federal claims when litigating their state claims in state court (as they undoubtedly must do when bringing an inverse condemnation action), they will still be collaterally estopped from going to federal court with their federal constitutional claims. *See Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), *cert. denied*, 119 S.Ct. 278 (1998). In short, there is little hope for a federal court hearing for California property owners seeking to vindicate their federal constitutional rights.

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[3] A facial challenge to a statute, alleging that it does not substantially advance the legitimate government interest, seems to be the only type of case that will occasionally survive to review on the merits in the Ninth Circuit. *See, e.g., Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 168 (1998); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 118 S.Ct. 1386 (1998).

And now, the California Supreme Court has determined to give only rational basis review to property regulations that do not substantially advance a legitimate governmental interest. With an extremely limited federal forum, and the California courts refusing to enforce *Nollan's* admonition that substantial advancement review is stricter than rational basis, California property owners are left unable to protect their constitutional rights by arguing that property regulations do not substantially advance a legitimate governmental purpose. Except for individually-determined exactions, the decision below in essence overturns *Nollan* in California.

Many situations raise the question of whether property regulations substantially advance their governmental purpose. For example, San Francisco recently passed an ordinance permitting only one eviction from an apartment building for an owner to move in for the life of the building, no matter the circumstances and no matter how many building owners there might be. Precluded from coming to federal court, the owners of several apartment buildings have brought inverse condemnation claims in California state court. After the California Supreme Court's decision in this case, any takings clause claim is rendered virtually meaningless, identical to a minimal due process review. Whether or not there has been any violation of these owners' constitutional rights, the plaintiffs' claims are essentially foreclosed in both federal and now California courts.

CONCLUSION

This Court has held that property owners are entitled to a review of whether governmental action impinging on property rights substantially advances a legitimate governmental purpose. *See Nollan*, 483 U.S. at 834-37. Unless this Court accepts certiorari in this case, California property owners, unlike any other property owners in the country, will no longer be able to bring such takings claims. More significantly, the fragmented jurisprudence and doctrinal confusion on the proper standard of review for regulatory takings merits a grant of certiorari by this Court.

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SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, Petitioner Santa Monica Beach, Ltd. (SMB), hereby replies to the Real Party in Interest's Brief in Opposition (Opp.) filed by the Santa Monica Rent Control Board (Rent Board) on April 20, 1999.

The petition for certiorari asks this Court to decide whether, in view of the ends-means nexus test of *Nollan v. California Coastal Commission*, a regulatory takings plaintiff may be barred from presenting evidence that the application of a rent control ordinance fails to substantially advance its legitimate police power objectives. Petition for Writ of Certiorari (Pet.) at i. This reply brief is filed to respond to new points raised in the Rent Board's opposition.

I

THIS IS NOT A FACIAL CHALLENGE TO THE VALIDITY OF RENT CONTROL IN GENERAL OR TO THE VALIDITY OF SANTA MONICA'S RENT CONTROL LAW

The tone of the opposition brief is established in the first sentence of its introductory paragraph:

> This is a facial attack to a rent control law premised on the theory that the law fails to "substantially advance legitimate state interests."[1]

Opp. at 1. The Rent Board is well aware that no facial attack is involved in this litigation, but it intends to build on this initial claim to support further distortions throughout its brief. It is therefore important at the outset to ensure that the Court is not lured into error on this point.

As was stated in the petition for certiorari, "[t]he facial validity of the Rent Ordinance is not at issue in this litigation, nor does Petitioner question that providing assistance to the

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[1] This claim and variations on it are repeated throughout the opposition brief. *See, e.g.*, Opp. at 13 ("Petitioner seeks review of the constitutionality *vel non* of rent control.").

poor, minorities, students, young families, and senior citizens is a legitimate interest of government." Pet. at 3. This statement is borne out by an examination of SMB's first amended complaint, which was submitted as Appendix E to the petition. *See* App. E-2 ("[SMB] respectfully seeks an order from this Court declaring that the Santa Monica Rent Control Charter Amendment effects an uncompensated regulatory taking of property ***as applied to plaintiff***"); App. E-7 ("the Charter Amendment ***as applied to plaintiff*** violates plaintiff's federal and state constitutional rights"); App. E-8 ("The Charter Amendment ***as applied to the Property*** has deprived plaintiff of essential attributes of ownership"); App. E-9 ("Plaintiff has received no compensation for the damages inflicted by defendant's ***application of the Charter Amendment to the Property***;" "the Rent Board's ***application of the Charter Amendment to the Property*** comprises a regulatory taking of plaintiff's Property"); App. E-13 ("for an order declaring that the Santa Monica Rent Control Charter Amendment, ***as applied to plaintiff***, comprises a regulatory taking of property") (emphasis added).

In short, the Rent Board's characterization of this case as a facial challenge to the constitutionality of rent control has no basis in the reality of this litigation.

Once the Rent Board's initial mischaracterization of this case as a facial challenge is rectified, many of its subsequent assertions collapse. For example, the Board claims,

> [p]etitioner asks this Court to adopt the following rule: the takings clause, unlike the due process clause, requires a close nexus between legislative means and ends for all economic regulation.

Opp. at 2. In view of the fact that this case challenges only the application of a *specific* ordinance to a *specific* property, such

baseless hyperbole on the part of the Rent Board merits no further response.

II

THE RENT BOARD'S CLAIM THAT THIS ACTION IS TIME BARRED IS FRIVOLOUS

One of the Rent Board's objectives in mischaracterizing the nature of SMB's complaint is to enable it to make what would otherwise be seen as a patently frivolous argument: that the claim is time barred. Opp. at 3, 11-12. Both the trial court and the court of appeal ignored this claim, and the California Supreme Court declined to deal with it. App. A-8. Having seen that the Rent Board's characterization of this case as a "facial" challenge is spurious, this Court should not be distracted by such diversionary statements as:

> Petitioner's claim was filed more than 16 years after enactment of *the challenged law*. Even if *this facial case* accrued some years later, . . . this case is barred.

Opp. at 3 (emphasis added).

Chasing its own red herring, the Rent Board engages in a lengthy and pointless disquisition on the statute of limitations for facial claims. Opp. at 11-12. Taking care not to cast its net too narrowly, the Board even cites to the statute of limitations for bringing facial challenges under 42 U.S.C. § 1983 in federal court (Opp. at 11), even though this is not a facial challenge, was not brought under Section 1983, and is not in federal court.

The correct analysis of this issue is straightforward. Under California law, as-applied regulatory takings claims must be brought via a petition for writ of administrative mandamus, joined with or followed by a complaint for inverse condemnation. *Hensler v. City of Glendale*, 8 Cal. 4th 1, 14 (1994). This joint claim must be brought within the statute of limitations for administrative mandamus, which in California is 90 days. Calif. Code of Civ. Proc. § 1094.6. SMB's complaint

establishes that the underlying cause of action accrued with the Rent Board's delivery of the administrative record on January 6, 1994. App. E-7. SMB's initial complaint was filed on March 16, 1994, well within the 90-day limitations period. Court of Appeal Supplemental Record in Support of Petition for Writ of Mandate at 2.

The Rent Board admits that SMB's combined petition and complaint was timely filed within the 90-day statute of limitations for administrative mandamus as required by *Hensler*. Opp. at 12. The Board also admits that the procedurally required mandamus petition and the interlocking inverse condemnation claim "rely on the same factual allegations." Opp. at 7. No matter what the statute of limitations may be for inverse condemnation claims, it is not shorter than the 90-day period within which the complaint in this case was filed. The Rent Board's statute of limitations argument is a textbook example of a frivolous defense, and should be treated as such by this Court.

III

THE DECISION BELOW COMPLETELY DISPOSES OF SMB'S FEDERAL CLAIM AND IS RIPE FOR REVIEW BY THIS COURT

The Rent Board asserts that there has not been a final decision in this case because no hearing has been held on SMB's procedurally required administrative mandamus petition. Opp. at 3, 5, 6-11. However, as the court below recognized, such a proceeding is wholly unrelated to the final determination of SMB's federal takings claim by the decision below. *See* App. A-10-11 n.2 (administrative mandamus action addresses only whether the Board's decision denied SMB a "fair return." The larger constitutional issue that is the subject of this petition is addressed and finally adjudicated by decision below).

The test for finality for purposes of jurisdiction under 28 U.S.C. § 1257(a) is whether the order of the court below has

fully adjudicated petitioner's rights, and that adjudication is not subject to further review by a state court. *Atlantic Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72 (1946). Even though ancillary state court proceedings may remain unresolved, a decision by a state's highest court is final if "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because . . . they are wholly unrelated to the federal question." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 (1975). Here, that requirement has been met because any further proceedings in a mandamus hearing will not ***and cannot*** affect the federal issue raised by this litigation, which has been fully and finally adjudicated by the decision below.

Proceeding with a mandamus hearing would force SMB's claims to be heard in a constitutionally inadequate forum which cannot provide the remedy of just compensation for a regulatory taking, as required by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 310-11 (1987). Moreover, facts adjudicated in this inadequate forum would have preclusive effect if the decision below is subsequently reversed and SMB is allowed a full evidentiary trial on its inverse condemnation claim. Accordingly, the decision below is final for purposes of jurisdiction by this Court under 28 U.S.C. § 1257(a).

A. California Courts Recognize That an Administrative Mandamus Hearing Is a Constitutionally Inadequate Forum to Adjudicate a Regulatory Takings Claim

As noted above, as-applied regulatory takings claims in California state courts *must* proceed by way of a petition for administrative mandamus (seeking invalidation of the offending government action) coupled with a complaint for inverse condemnation (seeking just compensation). *Hensler v. City of Glendale*, 8 Cal. 4th at 14. The Rent Board misleadingly refers to a hearing on the administrative mandamus petition as a "trial." Opp. at 5, 10. However, a mandamus hearing is a

radically different procedure from a full evidentiary trial. Such a hearing is limited to review, under a highly deferential "abuse of discretion" standard, of the record compiled by the Rent Board itself. Calif. Code of Civ. Proc. § 1094.5. This record is compiled with no regard for the due process rights of the petitioner. Evidence is inserted in or excluded from the record at the Board's discretion; the petitioner has no right to cross examine witnesses or to require that testimony be presented under oath. *See* Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepperdine L. Rev. 99, 104-06, 115-16 (1994). Because of these procedural defects the California Court of Appeal has recognized that "[a]s a practical matter, there is no way a landowner can make the appropriate record for a taking claim at the administrative proceedings," *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1174 (1994). Accordingly, "administrative mandate is not a substitute for a trial on the taking issues." *Id.*

B. The Constitutionally Mandated Remedy of Just Compensation for a Taking Is Not Available in a Mandamus Hearing, Which Offers Only the Prospect of a Remand to the Rent Board

The Board's most serious misrepresentation to this Court is its claim that "Petitioner can obtain all the relief it seeks in this case" via an administrative mandamus hearing. Opp. at 3. This Court has established that the constitutionally mandated remedy for a regulatory taking is just compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 310-11. However, in a recent case in which the Rent Board was the prevailing party, the California Supreme Court established that the only remedy available via mandamus for a claim such as the one at bar is a remand to the Rent Board itself for further proceedings. *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 865-66 (1997). The opposition brief fails even to mention *Kavanau*, but instead

misleadingly quotes from a pre-*Kavanau* opinion that was effectively overruled on this point by the latter decision: "'[T]he trial court is able to resolve the taking claim in the mandate proceeding.'" Opp. at 8 (quoting *Hensler v. City of Glendale*, 8 Cal. 4th at 15). Given the Board's intimate involvement with the *Kavanau* case, it is nothing short of dissembling to state:

> If Petitioner prevails on its state mandamus claim . . . *it will obtain full relief.*

Opp. at 10 (emphasis added). Thanks to the very arguments the Rent Board successfully advanced in *Kavanau*, the word "full" in the above sentence must be replaced, under current California law, by "no." The only issue that will be adjudicated before an administrative mandamus hearing is whether the Rent Board deprived SMB of a "fair return." App. A-10-11 n.2. Under *Kavanau*, the only "relief" available on this claim is a remand to the Rent Board for further proceedings. *See Kavanau*, 941 P.2d at 865-66. Thus, both the issues to be considered by and the remedy available from the mandamus hearing are unrelated to the federal constitutional question presented by this case.

C. The Decision Below Is a Definitive Ruling by the State's Highest Court on SMB's Regulatory Taking Theory

The Rent Board asserts that the decision below "precludes *one of* Petitioner's theories, but does not finally adjudge the case." Opp. at 6. In fact, however, the California Supreme Court has definitively ruled on SMB's sole legal claim implicating a federal issue: that the application of the Rent Control Law to SMB's property effects a taking by failing to substantially advance legitimate state interests. No other legal theory or issue exists in this case that is relevant to SMB's Fifth Amendment takings claim.

As the Rent Board admits, the only question that can be addressed in the constitutionally inadequate forum of an administrative mandamus hearing is whether SMB has received a "fair

return" on its property.[2] Nevertheless, as the Rent Board also acknowledges, factual findings arrived at in the constitutionally inadequate mandamus forum would be preclusive as to a subsequent evidentiary trial on the inverse condemnation claim--***even if SMB ultimately succeeds in obtaining a reversal by this Court of the decision below!*** Opp. at 10. *See Healing*, 22 Cal. App. 4th at 1178-79 ("If the administrative mandate petition is heard first, the doctrine of collateral estoppel may bar relitigation of some of the facts in the subsequent takings trial.").

SMB cannot avoid this trap by voluntarily dismissing its mandamus cause of action, since this is a procedural prerequisite to an as-applied regulatory taking claim in California. Abandoning the mandamus petition would automatically cause the entire complaint to be dismissed by the superior court on remand, following a reversal of the decision below by this Court. *See, e.g., Mola Development Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405, 413-14 (1997).

In short, the mandamus petition cannot be dismissed, cannot address the federal takings issue already fully adjudicated by the court below, and cannot grant the relief mandated by this Court for a regulatory taking, yet factual findings in such a forum would be preclusive as to any subsequent proceedings in a full evidentiary trial. Accordingly, the ruling of the California Supreme Court below must be considered final for purposes of establishing jurisdiction in this Court.

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[2] The Rent Board coyly refers to the fair return issue as "the traditional element" of a takings claim, Opp. at 5, to be determined under "traditional Fifth Amendment standards." Opp. at 10. Unfortunately the Rent Board has forgotten that in *Kavanau* it persuaded the California Supreme Court to rule that the fair return issue is not an element of a takings claim at all, but instead constitutes a due process claim with a due process remedy. *Kavanau*, 941 P.2d at 865-66.

IV

THE RENT BOARD DISTORTS THE HOLDING OF *SEAWALL ASSOCIATES* IN ORDER TO EVADE THE CLEAR CONFLICT BETWEEN THE HIGHEST STATE COURTS OF NEW YORK AND CALIFORNIA

In its petition, SMB pointed to the conflict between the decision below and the opinion of the New York Court of Appeals in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989). In its opposition the Rent Board distorts the *Seawall* decision by stating, "[t]he court found that the law affected [*sic*] a physical occupation because it denied an owner's right to possess and exclude others." Opp. at 21. What the Rent Board does not mention is that the *Seawall* court found that New York's Local Law 9 effected ***both*** a physical and a regulatory taking. The Rent Board neither addresses the relevant, *conflicting* portion of the *Seawall* opinion, nor acknowledges to this Court that it has suppressed the relevant half of the decision.

In fact, the New York high court expressly analyzed the constitutionality of the rental housing regulations at issue in that case under the standard this Court set forth in *Nollan*: "[Whether] the burdens imposed substantially advance legitimate State interests." 542 N.E.2d at 1068 (citation to *Nollan* omitted). The court concluded:

> The heavy exactions imposed by Local Law No. 9 must "substantially advance" its putative purpose of relieving homelessness. No such showing of this required "close nexus" has been made.

Id. at 1069. Accordingly, the measure was found to be unconstitutional unless just compensation was provided under the Takings Clause. *Id.* at 1070-71.

Contrary to the Rent Board's assertions, the *Seawall* decision plainly conflicts with the opinion below in both its

method of analysis and its ultimate holding. By applying *Nollan's* substantial advancement analysis to residential rent regulations, and finding such measures unconstitutional if they fail to substantially advance legitimate state interests, the New York Court of Appeals has come into direct conflict with the highest state court of California not once, but twice. *See* discussion of *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), Pet. at 26-27.

The Rent Board is ultimately reduced to attempting to distinguish these cases and *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *on their facts*--none of them involved a challenge to Santa Monica's Rent Control Law. Opp. at 21-22. However, as fully set forth in the petition for certiorari, each of them squarely conflicts with the decision below on the applicability of *Nollan's* ends-means analysis to local regulation of residential rental property.

CONCLUSION

For all the above reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be GRANTED.

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